REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 101 OF 2008

REPUBLIC .....STATE

VERSUS

PETER NJENGA MUIRURI .....ACCUSED

(Appeal from the Sentence of the Chief Magistrate's Court at Molo Hon. J. Oseko - Principal Magistrate delivered on the 22nd day of May, 2008 in CMCR Case No. 228 of 2007)

JUDGMENT

The appellant **PETER NJENGA MUIRURI** has filed this appeal challenging his conviction by the learned Principal Magistrate sitting at Molo Law Courts.

The appellant was first arraigned before the trial court on 13/2/2007, facing two counts of **ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296(2) OF THE PENAL CODE**. The particulars of the two counts were as follows

COUNT No. ONE

> ***"On the 27th day of November, 2006 at Total Trading Centre, Mau Summit Molo in Nakuru District within Rift Valley province, jointly with others not before court robbed EZEKIEL OKOKO of one television valued at Ksh 2,500/= radio make Nakwa valued at Ksh 700/= skyplast container valued at Ksh 600/= all amounting to Ksh 3,200/= and immediately before the time of such robbery threatened to use actual violence to the said EZEKIEL OKOKO"***

COUNT No. TWO

> ***"On the 27th day of November, 2006 at Total Trading Centre Mau Summuit Molo in Nakuru District within Rift Valley province, jointly with others not before court robbed JOHN KAMAU of radio Panasonic valued at Ksh 5,000/=, a battery valued at Ksh 3,500/= and other assorted clothes and shoes all valued at Ksh 13,240/= and immediately before the time of such robbery threatened to use actual violence to the said JOHN KAMAU'***

The appellant pleaded **'Not Guilty'** to both counts and his trial commenced on 6/8/2007. The prosecution led by **INSPECTOR MUTETI** called a total of three (3) witnesses in support of their case.

The complainant in Count No. 2 **JOHN KAMAU NJOROGE** who testified as **PW1** told the court that

on the night of 27/11/2006 he was asleep in his house at Total area in Mau Summit. At 3.00am the complainant heard people talking inside his house. He got up and found about six people inside his house. Three of the men were armed with pangas and three had torches. They ordered the complainant to put on the lights. He lit the hurricane lamp. The complainant said the men ransacked his house and stole his shoes, clothes Panasonic radio. All the while during the robbery the men were hitting the complainant. The complainant saw and identified the appellant as one of the men who robbed him.

The complainant reported the matter to the police. Later the complainant was called by the police to a house from which the appellant was arrested. Inside that house the complainant saw and identified his shoes and black jeans. The appellant was later taken to court and charged with the offence of Robbery with Violence.

At the close of the prosecution case the appellant was found to have a case to answer and was placed on his defence. He opted to give a sworn defence in which he denied any involvement in the Robbery in question. On 22/5/2008 the learned trial magistrate delivered her judgment in which she convicted the appellant for the offence of Robbery with Violence on Count No. 2 only. The trial court acquitted the appellant on the 1st Count of Robbery with Violence as no evidence was tendered in support of that charge and thereafter sentenced him to death. Being aggrieved by both this conviction and sentence the appellant filed his appeal.

As stated earlier the appellant had been acquitted of the 1st Count of the charge thus this appeal related **only** to Count No. 2 of the charge sheet.

Being a first appeal this court is obliged to re-examine and re-evaluate the prosecution case and draw its own conclusions on the same. **(see AJODE Vs REPUBLIC [2004] KLR 86).**

In this case the complainant testified that a group of men broke into his house on the night of 27/11/2006 at 3.00am. The incident happened at night. No doubt it was dark. However the complainant stated that he was able to see the appellant whom he named as **'Muiruri'**.

Although the incident occurred during the night the complainant told the court that the men who broke into his house had torches. Additionally the robbers ordered the complainant to put on the lights. The complainant obliged and put on the hurricane lamp. The lights from the torches combined with the hurricane lamp provided sufficient light and illumination to enable the complainant to see his attackers.

The robbers spent time inside the complainant's room. They spoke to him. Their faces were not masked. The complainant was able to give a clear account of the role which the appellant played in the incident. Under cross-examination at Page 5 line 20 the complainant explains

> ***"You were the one directing the others ....."***

The complainant was also able to positively identify the appellant by certain peculiar features on his head. At Page 4 line 7 he states

> ***"I identified Muiruri. I recognized a cut mark on the side of his head....."***

The trial court noted that indeed the appellant had a visible cut wound on his head about 4 inches long. The complainant went on to state on the same page line 16

> ***"I lit the hurricane lamp. Then accused removed my shoes under the bed. I saw clearly his cut mark on his head. Another one is a Turkana took the radio and the battery from his hand ....."***

The fact that the complainant was able to give such a detailed account of the events of that night including specifying the role which the appellant and others played in the incident persuades me that he was able to see them clearly. The complainant has identified the appellant by a specific mark on his head. This was a

mark which was peculiar to the appellant only.

Aside from visual identification the complainant told the court that he was able to recognise the appellant as he knew him before this incident occurred. Under cross-examination at Page 5 line 20 the complainant says

> ***"I know you. I have known you for 3 months. I know you as Nganga Muiruri"***

Thus there exists clear evidence of recognition. The Court of Appeal in **ANJONONI and OTHERS Vs REPUBLIC [1980] KLR 59** stated as follows

> ***"Being night time conditions for identification of the robbers in this case were not favourable. This was however a case of recognition, not identification of the assailants, recognition of an assailant is more satisfactory, more assuring, and more reliable that identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other ..."***

Similarly in this case though the incident occurred at night the complainant knew his assailant and was therefore able to **recognise** him. I am mindful of the fact that this is identification by a single witness. However I do find that given the circumstances enumerated above the complainant having been in close proximity with appellant for several minutes, he had ample time and opportunity to see and identify the appellant. I am satisfied that there was a clear, positive and reliable identification of the appellant.

Aside from evidence placing the appellant at the scene of the robbery, there also exists evidence of recovery which further serves to implicate the appellant in this robbery. **PW2 CHARLES KANGETHE WANJAU** told the court that on the same night of 27th/28th November, 2006 at about 4.30 am he was asleep inside his house when one '**Magreen'** (whom he knew as a former neighbour) and 2 others came to his house.

The men brought some items including a radio which they offered to sell to **PW2**. The witness had no money to purchase the items so the men left.

PW2 identified the appellant as one of the men who came with **'Magreen'** to his house offering him items for sale. **PW2** was able to positively identify the appellant due to the prominent scar on his head. Later appellant led police to the house of **PW2** to check for the stolen items.

PW3 PC JACKSON KANGOGO is the investigating officer. He told the court that acting upon information from the public police on 29/11/2006 went to a certain house where they found the appellant sleeping. They recovered inside that house certain items including a TV and radio which were suspected to have been stolen. The complainant also came to that house and identified the appellant as one of the men who had robbed him the previous night. The complainant further identified the trouser and shoes which the appellant was wearing as the clothes which had been stolen from him.

The trouser and the pair of shoes were produced in the court as exhibits **P.exb 1** and **P.exb 2**. The complainant was able to positively identify them as his property due to certain peculiar marks on them. In his evidence at Page 5 line 6 the complainant explains

> ***"Inside that house I saw my shoes these ones (P.exb 1) I identified it. I had put on it a super glue and cement to stitch the rubber that is how I identified it. I also saw a pair of black jeans trouser P. Exb 2. It had stains of shoe polish which stuck to it. I had not washed it....."***

Therefore the complainant was able to positively identify his stolen property due to certain marks which he had put on them. This therefore is a case where the doctrine of **'recent possession'** would squarely apply.

In the case of **MATU Vs REPUBLIC [2004] 1KLR 10** the Court of Appeal sitting in Nyeri held as follows

".....under the doctrine of recent possession, where it is proved that premises have been broken into and that certain property has been stolen there-from and that very shortly afterwards, a person is found in possession of that property, that is certainly evidence from which it can be inferred that the person is the house breaker or shop-breaker"

Similarly in the later case of **ISSAC NGANGA KAHIGA** alias **PETER NGANGA KAHIGA Vs REPUBLIC [2005]eKLR** it was held

"It is trite law that before a court can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved. In other words there must be proof, first that the property was found with the suspect, and secondly that, the property is positively the property of the complainant, thirdly that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen properties can move from one person to another....."

In this case the complainant has given credible evidence of having been robbed on the night of 27th/28th November, 2006. Barely one day later the appellant is found in possession of (in fact is found wearing) items which the complainant positively identifies as his property which had been stolen from him during that robbery. The only possible and logical conclusion from this set of facts would be that the appellant was a participant in the robbery.

In his defence the appellant claims that the house from which he was arrested did not belong to him. He claims that the house belonged to his brother who had rushed a sick child to hospital. The appellant's claims have no bearing on the aspect of recovery since both **PW2** and **PW3** state that he was found actually wearing the black jeans trouser and the shoes. They were found on the appellants body thus were clearly in his possession.

The appellant also denied in his defence that he was found wearing the clothes. He states that the clothes were brought to the police station **after** his arrest and planted on him. Firstly the appellant did not raise this issue when cross-examining **PW3**, showing that this part of his defence is merely an afterthought. Secondly the appellant in cross-examining **PW3** suggested that he was not found inside the house in question but was merely summoned by police from the road side to help carry the recovered items. Yet in his defence the appellant appears to concede that he was in fact found inside the house saying it was his brother's house. By this back and forth it is clear that the appellant was not being truthful. I therefore dismiss his defence its entirety.

The evidence clearly shows that the complainant was the victim of a Robbery on the night of 27/11/2006. The robbery was perpetrated by six men armed with panga's. The incident amounted to a Robbery with Violence as envisaged by Section 296(2) of the Penal Code. I am satisfied that the prosecution did prove the charge beyond reasonable doubt. The appellant's conviction was sound and I do hereby confirm that conviction. The death sentence being the mandatory sentence upon conviction for this offence is also upheld. This appeal therefore facts entirely and is therefore dismissed.

Dated and Delivered in Nakuru this 31st day of March, 2017.

Appellant in court

Mr. Motende for State

Maureen A. Odero

Judge