REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 110 OF 2015

MESHACK MUTIRIA MBUBU .....1ST APPELLENT

JAIRO NATO MULUMA .....2ND APPELANT

MOSES ADIRA KIYAI .....3RD APPELLANT

AGGREY AJEGA EMBWAKA .....4TH APPELLANT

ELIJAH CHIRA KARIUKI .....5TH APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal against the judgement and sentence by Hon. T. A. ODERA P.M. in Mavoko Criminal Case No. 979 of 2012 delivered on 7th April, 2015

JUDGEMENT

1. The Appellants herein **MESHACK MUTIRIA MBUBU, JAIRO NATO MULUMA, MOSES ADIRA KIYAI** and **AGGREY AJEGA EMBWAKA** together with another who was acquitted by the trial court had been charged with a principal charge of robbery with violence contrary to Section 295 as read with Section 296(2) of the Penal Code and an alternative charge of handling suspected stolen goods contrary to Section 322 (1) as read with Section 322 (2) of the Penal Code.

The particulars of the main charge were that on the night of 16th and 17th day of December, 2012 at EPZ Global Factory in Athi River District in Machakos County jointly with others not before the court while armed with dangerous weapons namely metal bars, pillars and hacksaw robbed off David Mwambu Matheka 75 Industrial sewing machines, computer, 3 steel electrical iron boxes, 2 CCTV cameras and 240 assorted clothes all valued at Kshs.5, 488,000/= and at the time of the said robbery killed the said **David Mwambu Matheka**.

The particulars of the alternative charge were that on the 17th day of December, 2012 at EPZ Global Factory in Athi River District in Machakos County otherwise than in the course of stealing, dishonestly retained 74 Industrial sewing machines, a computer, 3 steel electrical iron boxes, 2 CCTV cameras and 240 assorted clothes knowing or having reason to believe them to be stolen or unlawfully obtained.

2. The trial court heard a total of ten witnesses from the Respondent and thereafter convicted and sentenced the Appellants to death. The Appellants were aggrieved and have raised the following

common grounds of appeal:

a. That the learned Magistrate erred in law and fact by convicting the Appellants while relying on insufficient evidence given by the prosecution.

b. That the learned magistrate erred in law and fact in convicting the Appelants on a duplex charge.

c. ***That the learned Magistrate erred in law by failing to appreciate the doctrine of recent possession had not been proved against the Appellants within the meaning of Section 4 of the Penal Code.***

d. ***That the learned Magistrate erred in law by failing to comply with the provisions of Section 169 of the Criminal Procedure Code.***

e. ***That the learned Magistrate erred in law and fact by failing to appreciate the Appellants Constitutional rights under Article 50(2) of the Constitution were contravened.***

3. As this is a first Appellate court, its duty is to re-evaluate the evidence tendered before the trial court and to come to its independent conclusion bearing in mind that it had no opportunity of hearing and seeing the witnesses. (see **OKENO VS REPUBLIC [1972] EA 32** and **PETERS VS SUNDAY POST [1958] EA 424.**

4. Summary of Prosecutions Case:

Police constable Keter Kipengetich (PW.6) on the material night received a call from an informer that certain strangers had gained access to one of the EPZ premises with an intention to steal property and the said officer alerted his fellow colleagues on duty namely PC. Mwinzi (PW.5), PC Mbogo (PW.7) and Omar Shaban (PW.3) and they rushed to the scene and found that indeed a barbed wire fence had been lifted thereby suggesting that indeed some trespassers had gained entry into the premises. They decided to wait and lay ambush for the thieves who would definitely pass by after their theft mission. It was a long wait that took time almost four hours when true to their prediction the thieves emerged. They saw three men shuffling along and carrying loads in sacks. They ordered them to stop and that the thieves dropped the sacks and at the same time PC. Keter fired shots in the air. Two of the thieves were apprehended while the third one slipped away. The two who were arrested turned out to be **Aggrey Ajega Embweka (4th Appellant) and Jairo Nato Muluma (2nd Appellant).** The sacks were checked and found to contain assorted clothes. The officers then conducted a search of the area and recovered more clothes and some Industrial machines. More police reinforcements were sought from the EPZ police post and the scene was thoroughly searched and Moses Adira Kiyai (3rd Appellant) was found hiding among the grass. He was promptly arrested and he led the officers to a nearby sentry room where Meshack Mutiria Mbubu (1st Appellant) and Elijah Chira Kariuki (5th Appellant) were found hiding beside the body of the complainant David Mwambu Matheka who had been a night security guard in the premises. The two were promptly arrested. The officers were joined by Sergeant Mwangi (PW.9). The officers surveyed the guard house and noticed a window grill near a perimeter wall had been cut by the robbers. A wallet was spotted near the body of the nightguard. The body of the dead nightguard had been tied with pieces of clothes and it had injuries on the head. The recovered wallet contained personal items such as ID Card, ATM card, voters card, belonging to Moses Adira Kiyai (3rd Appellant). The Investigating officer PC. David Sakwa (PW.1) visited the scene and recovered the stolen items as well as the weapons that had been used by the robbers such as a hacksaw, pliers, and metal bar. He also organized for the body of the deceased to be taken to the mortuary where Dr. Fredrick Okinyi (PW.3) conducted a post mortem and who noticed skull bruises and contussions and formed the opinion that the deceased had died due to asphyxia from manual strangulations. The Doctor also noticed injuries on the hands indicating a struggle while the head injuries indicated that he had been hit with a blunt object. The Investigating officers then charged the Appellants with the offence. The trial court later established that the Appellants had a case to answer and placed them on their defence. All of them tendered unsworn statements.

5. Summary of the defence case:

The first Appellant **Meshack Muturia Mbubu** stated that he was on duty on the material night guarding his employers premises namely EPZ Global when he was attacked by robbers who tied his hands and legs and locked him in the security room. He stated that soon thereafter police officers arrived and implicated him as one of the robbers yet he had nothing at all to do with the robbery.

The second Appellant **Jairo Nato Muluma** stated that he had just come from watching a football match at a certain club and was on his way home when he met police officers on night patrol who arrested him for failing to have his ID Card and who later charged him with the alleged offence.

The third Appellant **Moses Adira Kiyai** stated that he was enjoying a drink at a certain bar in Company of a lady when a police officer turned up and developed an interest on the lady and a disagreement arose between him and the officer over the said woman as a result of which the officer handcuffed him and took him to EPZ police post from where he was charged with the offence herein. He further stated that the said officer gave evidence in the case as one of the arresting officers (PW.6). He confirmed that a wallet containing an ID card, Yu line, phone receipts, bank ATM card and payslips as well as a sum of Kshs.3,800/= belonged to him and which was produced as an exhibit in the case.

The fourth Appellant **Aggrey Ajega Embwaka** stated that he had gone to have a drink at a certain night club and while on his way home, he met police officers on patrol and that an argument arose whereupon they assaulted him and then arrested him promising to teach him a lesson. He stated that they took him to EPZ police post from where he was arraigned in court over an alleged robbery with violence.

The fifth Appellant **Elijah Chira Kariuki** stated that on the morning of 17/12/2012 at 6.30 a.m. he was rushing to the market to purchase green maize for his regular maize roasting business when he was stopped by the police who claimed that he was one of the robbers and even after he vehemently denied, they bundled him onto their vehicle and took him to Athi River Police Station where he was booked for a strange offence.

6. The trial court analyzed the entire evidence and gave the benefit of doubt to the 5th Appellant and acquitted him but convicted and sentenced to death the 1st, 2nd, 3rd and 4th Appellants herein.

7. Parties agreed to canvass the appeal by way of written submissions. I have considered all the submissions by the Appellants and counsel as well as the Respondent. I have also considered the evidence adduced before the trial court I find the following issues necessary for determination:-

> **a. Whether the charge on the main count was duplex and its effect on the conviction and sentence of the Appellants.**
>
> **b.** ***Whether the doctrine of recent possession was properly applied by the trial court in arriving at a finding of guilty against the Appellants.***
>
> **c. Whether the Respondent's case had been proved beyond reasonable doubt.**

8. As regards the first issue, it is noted that the appellants had been charged with a main charge of robbery with violence contrary to Section 295 as read with Section 296 (2) of the Penal Code. It is a fact that every trial court conducting criminal proceedings must have regard to the provisions of Section 314 of the Criminal Procedure that dictates that persons facing charges are entitled to proper information in a charge sheet so as to enable them understand them clearly as they are taken through the criminal trial process. The said Section 314 provides as follows:-

> "**Every charge or information shall contain and shall be sufficient if it contains a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged"**

Sections 295 and 296 of the Penal Code provide for different scenarios and therefore if they are lumped together could create confusion in the mind of an accused person as he is likely not to know the exact offence for which he is facing. For instance Section 295 of the Penal Code provides as follows:

> "***Any person who steals anything and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery."***|

Section 296 on the other hand creates the offence of aggravated robbery and provides a stiffer penalty of capital punishment as follows:

> **1. "Any person who commits the felony of robbery is liable to Imprisonment for fourteen years.**
>
> **2.** ***If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death."***

From the above provisions, it is clear that Section 295 of the Penal Code provides the definition of the offence of robbery while section 296 provides for the punishment thereof. The Court of Appeal in the case **of JOSEPH NJUGUNA MWAURA & 2 OTHERS =VS= REPUBLIC CR. A. No 5 of 2008 [2013] eKLR** stated as follows on the issue of duplicity of a charge:-

> "**We reiterate what has been stated by this court in various cases before us; the offence of robbery with violence ought to be charged under Section 296 (2) of the Penal Code. This is the Section that provides the ingredients of the offence, which are either the offender is armed with a dangerous weapons, is in the company of others, or if he uses personal violence to any person. The offence of robbery with violence defined under Section 295 of the Penal Code, which provides that any person who steals anything and at or immediately the time of stealing it uses or threatens to use actual violence to any person or property in order to steal it. It would not be correct to frame a charge for the offence of robbery with violence under Section 295 and 296(2) as this would amount to a duplex charge."**

Even though the charge herein preferred against the Appellants appears to be duplex, the issue of concern is whether the same had prejudiced the Appellants in any way. It is noted that the Applicants pleaded to the charge and participated in the trial from the start to the end of the proceedings. They ably cross-examined witnesses and conducted their defence. The particular of the offence were stated in unambiguous manner. Hence I find the Appellants did not face any confusion whatsoever as to the kind of offence they faced. The duplicity of the charge did not cause the Appellants any prejudice. Again the Appellants did not raise any issue of duplicity during the trial and therefore having participated fully in the trial, they cannot now turn around and claim that they had been prejudiced by the duplicity. Furthermore the defect if any can easily be cured by Section 382 of the Criminal Procedure Code.

9. As regards the second issue it is not in dispute that several items belonging to Global EPZ such as Industrial sewing machines assorted clothes, CCT cameras, electrical iron boxes were recovered at the scene of crime. The security officers upon receiving a report divided themselves into two groups the first group comprised of PW.3, PW.5 and PW.6 and who laid ambush near the perimeter chain link fence where the suspects had first gained access. As they waited, the 2nd and 4th Appellant and another who managed to escape emerged while carrying sacks and upon being arrested it was discovered that they had been carrying assorted clothes. More searches were conducted within the expansive compound where several industrial sewing machines were recovered. The second group of officers spotted the 3rd Appellant hiding in the grass and was promptly arrested. The said 3rd Appellant led the officers to the sentry guard house where the 1st Appellant and another who was later acquitted by the trial court were found hiding. It was at the sentry room that the body of the night guard David Mwambu Matheka was

discovered and that a wallet belonging to the 3rd Appellant was recovered beside the body. The officers also discovered that a wall had been drilled and several weapons such as hack saw, pliers and metal bars were recovered. Another search yielded more industrial sewing machines. All the five suspects were then arrested and the body of the nightguard taken for examination. The pathologist established that the deceased had died due to manual strangulation and head injury. The Appellants were arrested at the scene of the robbery and that the recovery of the stolen goods a few hours of the robbery left no doubt about the involvement of the Appellants in the crime. The 2nd and 4th Appellants were found in possession of part of the stolen items namely assorted clothes while the 3rd Appellant was discovered hiding in the grass with the stolen industrial sewing machines near him while the 1st Appellant and the other who was acquitted by the trial court were found hiding inside the sentry house with the body of the dead guard nearby. Again a wallet belonging to the 3rd Appellant was found near the body of the deceased nightguard. There is therefore no doubt that all the Appellants were in concert in the robbery and that the trial magistrate properly found that the recovery of the stolen goods and the arrest of the Appellants within the vicinity of the crime as well as the discovery of the body of the dead nightguard clearly established that an offence of robbery with violence had been committed. The 2nd and 4th Appellants did not offer an explanation as to how they got possession of the assorted clothes that had just been stolen from the Global EPZ factory. Again the 3rd Appellant did not explain, what he was doing while hiding in the grass with several industrial sewing machines that had been stolen beside him and also did not offer an explanation as to how his wallet ended up near the body of the dead nightguard. It was the 3rd Appellant who led the officers to the sentry room where the other two suspects were found hiding. All these left no doubt that they were all involved in the robbery. An inference can be drawn that they participated in the robbery. The death of the nightguard and the subsequent theft of the items were related activities involving the Appellants. It is obvious that the Appellants had to get rid of the nightguard in order to accomplish their mission of stealing the items. The mission turned awry after the police got word and rushed to the scene where the Appellants were arrested within the crime scene and stolen goods recovered. In the case of **PETER KARIUKI KIBUE = Vs= REPUBLIC [2001] eKLR** the court dealt with a matter where the Appellant was found in possession of recently stolen items and he failed to give a satisfactory explanation as to how he came by them. The court stated that:

> "**The Appellant was in law duty bound to offer a reasonable explanation as to how he came to be in possession of the items, otherwise than as the thief or guilty receiver. This is a rebuttable presumption of law based on the provisions of Section 119 of the Evidence act."**

In the case of **MALINGI =VS= REPUBLIC [1989] KLR 225** the Court of Appeal had this to say about the doctrine of recent possession.

> "**By the Application of this doctrine the burden shifts from the prosecution to the accused to explain his possession of the item complained about. He can only be asked to explain his possession after the prosecution has proved certain basic facts. Firstly that the item he has in his possession has been stolen, it has been stolen a short period prior to their possession; that the lapse of time from the time of its loss to the time the accused was found with it was from the nature of them and the circumstances of the case, recent: that there are no co-existing circumstances which point to any other person as having been in possession of the items .....The accused is called upon to offer an explanation in rebuttal which if he fails to do an interference is drawn that he either stole or was a guilty receiver."**

The circumstances of the Appellants in this case required that they not only offer an explanation as to how they were found in possession of the stolen goods or to offer an explanation as to how stolen goods were found near them or to offer an explanation as to how they found themselves at the scene of crime and finally how they found themselves at the premises of Global EPZ Factory at that time of the night with a nightguard having been killed. The Appellants failed to offer any explanation in that regard and hence the trial Magistrate rightly held that indeed the Appellants had committed the offence of robbery with violence during the night in question.

10. As regards the last issue, I find that the prosecution had proved its case against the 2nd, 3rd and 4th

Appellants beyond any reasonable doubt. The evidence against the three was quite overwhelming in that the 2nd and 4th Appellants were the first to be arrested while emerging from the factory carrying assorted clothes that had just been stolen during a robbery in which a nightguard David Mwambu Matheka had been killed. The 3rd Appellant was arrested while hiding in some grass within the factory compound and near him were several industrial sewing machines that had just been stolen from the factory. The 3rd Appellant led the police officers to the sentry house where the body of the night was discovered and where a wallet belonging to the 3rd Appellant was recovered. It was the 3rd Appellant who also led the officers to another room where the 1st Appellant and another who was later acquitted were found hiding. It is only the 1st Appellant who appeared to offer a plausible explanation to the effect that he had been a nightguard and that he had sought refuge when the robbers struck. Even though the police appear to suggest that the said 1st Appellant might have colluded with the robbers by allowing them access to the factory, the said claim appears to be one only of suspicion since the officers confirmed that indeed the 1st Appellant was in official confirm. I find suspicion alone is not sufficient to sustain a conviction and in that regard I find that the Prosecution's case against the 1st Appellant was not proved beyond any reasonable doubt. The 1st Appellant is entitled to the benefit of doubt.

11. In the result it is the finding of this court that the 1st Appellant's appeal has merit. The same is allowed and that the conviction and sentence of **MESHACK MUTIRIA MBUBU** is hereby set aside and he is ordered to be set at liberty forthwith unless otherwise lawfully held. The Appeals by the 2nd, 3rd and 4th Appellants are found to lack merit and are dismissed and that their conviction and sentence by the trial court is upheld.

It is so ordered.

Dated and delivered at Machakos this 24th day of November, 2017.

D. K. KEMEI

JUDGE

In the presence of:-

Machogu for Respondent

1st Appellant

2nd Appellant

3rd Appellant

4th Appellant

Kituva – Court clerk