REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.175 & 176 OF 2012

(An Appeal arising out of the conviction and sentence of T. Okelo – SPM

delivered on 15th June 2012 in Makadara CM. CR. Case No.3746 of 2009)

JACKTONE ONDEKO.....1ST APPELLANT

ZEDEKIAH OBEWA.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The 1st Appellant Jacktone Ondeko and the 2nd Appellant Zedikiah Obewa were charged with another (who was acquitted by the trial court) with two counts of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**. The particulars of the offence were that on 31st August 2009 at Kayole Estate in Nairobi County, the Appellants jointly with others not before court, while armed with dangerous and offensive weapon, namely a pistol, robbed Charles Muchiri and Julia Wangari of their motor vehicle Registration No.KAB 596Y Toyota Corolla, a mobile phone and Kshs.700/- and at or immediately before or immediately after the time of such robbery respectively shot dead Charles Muchiri (the deceased) and threatened to use actual violence to the said Julia Wangari. When the Appellants were arraigned before the trial magistrate's court, they pleaded not guilty to the charges. After full trial, they were convicted of both counts. They were sentenced to death in respect of the 1st Count. The death sentence in respect of the 2nd Count was held in abeyance. The Appellants were aggrieved by their conviction and sentence. Each Appellant filed a separate appeal challenging his conviction and sentence.

The Appellants raised more or less similar grounds of appeal in their petitions of appeal. They were aggrieved that they had been convicted on the basis of evidence of identification that was made in circumstances that were not conducive for positive identification. They took issue in the manner in which the police identification parade was conducted. In their view, the said identification parade was unfairly and unprocedurally conducted. They were aggrieved that the trial magistrate had improperly applied the doctrine of recent possession in circumstances where the alleged stolen goods were not established to have been found in their possession to the required standard of proof. They faulted the trial magistrate for failing to take into consideration their respective defences before arriving at the decision finding them guilty as charged. In the premises therefore, the Appellants urged the court to allow their respective appeals, quash their convictions and set aside the sentences that were imposed on them.

During the hearing of the appeals, the two separate appeals lodged by the Appellants were consolidated and heard together as one. This court heard oral rival submission made by Mr. Chacha Mwita and Mr. Ayieko for the Appellants and Ms. Aluda for the State. Whereas counsel for the Appellants urged the court to allow the appeal in light of the paucity of prosecution evidence connecting the Appellants to the crime, Ms. Aluda submitted that the prosecution had adduced sufficient strong culpatory evidence which established the two charges facing the Appellants to the required standard of proof. This court shall revert to the arguments made by the parties to this appeal after briefly setting out the facts of this case.

It was the prosecution's case that on 30th August 2009, PW1 Julia Wangari, PW2 Joseph Muraguri Kiragu and PW4 Peterson Ndegwa Ngara were invited to attend a birthday party of one James which was held at Saika Estate in Kayole. The party started at about 5.00 p.m. According to the three witnesses, the party went on uneventfully until 11.00 p.m. when the three witnesses decided to retire to their respective homes. They were offered a lift by the deceased in his motor vehicle Registration No. KAB 596Y Toyota Corolla. According to PW1 and PW2, the deceased first dropped one John Chege and his wife at Kayole. He then drove the car to Kayole Sabasaba where PW2 resided at the time. The deceased stopped the vehicle outside the gate of the compound where PW2 lived. PW2, his wife and his daughter alighted from the vehicle. PW1 testified that at that time she felt nausea and wanted to vomit. She alighted from the car. The deceased also alighted from the car to answer a call of nature.

According to PW2, it took a while before the gate was opened. It was then that PW1 and PW2 heard gunshots. PW2 ran away while screaming. PW1 saw the deceased run towards the vehicle before he slumped to the ground and fell on his back. The deceased had apparently been shot. PW1 testified that the robbers, who were three in number, then bundled her into the motor vehicle before they drove away from the scene of crime towards Umoja. They robbed her of her mobile phone and Kshs.800/-. PW1 testified that while in the motor vehicle, the robbers were referring to one of them as Tony. She testified that she was able to identify the Appellants as two of the robbers during the time that she was at close proximity with them. However, it was clear from the evidence that later emerged that PW1 did not give the description of her assailants in the first report that was made to the police.

On his part, PW2 testified that when he heard the gunshots, he ran away from the scene and did not therefore identify any of the robbers. PW4 testified that on the material night, he got out of the vehicle when PW1 indicated that she felt nausea and wanted to vomit. While outside the motor vehicle, he heard gunshots. He ran away from the scene. Prior to running away from the scene, he saw some people enter the vehicle and they drove it off. He told the court that he was able to identify the Appellants as the persons who robbed them on the material night. He however testified that he did not see the person who shot the deceased. It was not clear from PW4's evidence how he was able to be positive that he had identified the Appellants as the persons who robbed them taking into consideration that the incident took place at night. PW4, again, did not give the description of the robbers in the first report that he made to the police or the source of light that enabled him to be positive that he had identified the appellants.

PW1 and PW4 were later on 14th September 2009 called to Kayole Police Station to attend a police identification parade. In the identification parade conducted by PW5 Inspector Francis Mwicha, PW1 and PW4 identified the Appellants in the said identification parade. It was on the basis of this evidence of identification that the prosecution secured the conviction of the Appellants.

The prosecution adduced further evidence which was to the effect that the Appellants were found in possession of items which were stolen from the motor vehicle during the material night of the robbery. According to PW3 Philip Muiruri Mungai, at the material time, he had been employed by the deceased to drive motor vehicle Registration No. KAB 596Y as a taxi. The deceased had requested him to use the motor vehicle on the material night he was shot. On 31st August 2009, he was summoned to Kayole Police Station and shown the motor vehicle which had by then been recovered. He was also shown two speakers, a radio face and keys. He positively identified these items as the ones which were removed from the motor vehicle on the night of the robbery. PW7 PC Joseph Tarus then of Muthaiga Police Station testified that on 2nd September 2009, they received information that there were suspicious people in a certain house. They went to the house. Interestingly, PW7 did not give the location of the house. He testified that the house was a single room. They found three men and one girl in the room. They searched

the house and recovered two motor vehicle speakers, a radio face and ignition keys. These were the items that were positively identified by PW3 as the ones that were robbed from the motor vehicle on the night of the robbery. As pointed out during cross-examination, PW7 did not establish from the Landlord the identity of the person who had rented the house. He did not establish who owned the house. He further did not establish who brought the items to the house. The trial court applied the doctrine of recent possession to reach a finding that the items recovered in the house connected the Appellants to the robbery.

When they were put to their defence, the Appellants denied participating in the robbery. They told the court that they were arrested when they were having lunch in the house of one Mzee Samuel Onjungo. They denied that they were connected with the items which were found in the house where they were arrested. In essence the Appellants testified that they were innocent.

This being a first appeal, it is the duty of this court to subject the evidence adduced before the trial court to fresh scrutiny and re-evaluation before reaching its own independent determination whether or not to uphold the conviction of the Appellant. In doing so, this court is required to bear in mind that it neither heard nor saw the witnesses as they testified and cannot therefore make a comment regarding the demeanor of the witnesses (See **Okeno –vs- Republic [1972] EA 32**). In the present appeal, the issue for determination by this court is whether the prosecution established the charges of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code** to the required standard of proof beyond any reasonable doubt.

As stated earlier in this judgment, the prosecution essentially relied on two pieces of evidence to secure the conviction of the Appellants. The first piece of evidence is that of identification. PW1 and PW4 testified that they were able to positively identify the Appellants during the night of the robbery. From their evidence, it was not clear how they were able to identify the Appellants at that time of the night. The source of the light that enabled them to identify the Appellants was not indicated. It was also clear that PW1 was sick at the time and could not have been in a position to identify the robbers. It is not clear from the evidence what caused the nausea. What is evident is that the nausea may have impaired PW1's capacity to identify the robbers. PW4 testified that when he heard the gunshots, he ran away from the scene. He did not explain from what position he was able to see and identify the Appellants as the persons who robbed him. He did not give the distance that he was standing *vis a vis* the position of the robbers to enable him to be positive that he had identified the appellants as the robbers. He did not give any marks that distinguished the appellants as the robbers.

PW1 and PW4 did not give the description of the robbers in the first report that was made to the police. In the absence of such description, this court is unable, with certainty, to support the prosecution's claim that the two witnesses had positively identified the Appellants as the persons who robbed them. It was also apparent to this court that in the hectic circumstance of the robbery, especially where gunshots were fired, it cannot be ruled out that the witnesses may have been mistaken that they had positively identified the Appellants as the persons who robbed them. In **Kenneth Maina Mwangi & 5 Others -Vs- Republic [2005] eKLR**, Lesiit & Makhandia JJ held that the court should cautiously treat the evidence of an alleged identification if the circumstances favouring positive identification were absent. This is more so where the robbery incident took place at night. We agree with this holding.

What was the effect of the evidence of identification parade? As stated earlier in this judgment, it was apparent from the evidence adduced by PW1 and PW4 that they did not give the description of the persons who robbed them in the first report that they made to the police. It has previously been held, and we do also hold that the evidence of an identification made in a police identification parade is worthless where the identifying witness did not give the description of the person being identified as the perpetrator of the crime in the first report that was made to the police. The reason for this is simple. The description given in the first report made to the police will assist the court in determining the credibility of an identifying witness who claims to have made visual identification during the time the crime was committed. In the present appeal, as reiterated earlier, the possibility that the identifying witness may be honestly mistaken that they had identified the Appellants as being the persons who robbed them cannot be ruled out. In the circumstances therefore, we are unable to uphold the evidence of identification.

We now turn to the application of the doctrine of recent possession. As was succinctly explained by Bosire, J (as he then was) in **Malingi –Vs- Republic [1989] KLR 225 at P.227**:

> "***By the application of the 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 have proved certain basic facts. Firstly that the item he had in his possession had been stolen; it had been stolen a short period prior to the 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 the item and 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 item. The doctrine being a presumption of fact is a rebuttable presumption. That is why the accused is called upon to offer an explanation in rebuttal, which if he fails to do an inference is drawn that he either stole it or was a guilty receiver."***

In the present appeal, for the prosecution to sustain the conviction of the Appellants on the application of the doctrine of recent possession, the prosecution was required to prove that the items which were robbed from the motor vehicle were found in possession of the Appellants so soon after the said robbery. It was the prosecution's case that the Appellants were found in possession of two speakers, a radio face and keys which were positively identified by the driver of the motor vehicle when the motor vehicle was recovered.

PW7 testified that he received information that there were certain suspicious persons in a house. We were not told where this house is located. PW7 testified that upon searching the house, they recovered the two speakers, the radio face and the keys. There was another person in the single room where the Appellants were arrested. As stated earlier in this judgment, PW7 confirmed that he was not certain who the owner of the house was. If the police had been diligent, they would have established from the Landlord or from the neighbours who the legal occupants of the house were. The Appellants denied that they were the owners of the house where the said items were recovered. In the absence of this crucial evidence to controvert the evidence adduced by the Appellants in their defence, this court cannot in the circumstances of this case reach a finding that a critical limb in the application of the doctrine of recent possession *i.e.* that the Appellants were found in possession of the stolen items so soon after the robbery had been established. That missing link weakens the prosecution's reliance on the application of the doctrine of recent possession in this case.

Taking into consideration the entire circumstances of this case, and on re-evaluation of the evidence adduced before the trial court, we are unable to uphold the conviction of the Appellants. In the premises therefore, the appeals lodged by the Appellants are hereby allowed. Their respective convictions are quashed. The death sentence imposed on them is set aside. The Appellants are ordered set at liberty and released from prison forthwith unless otherwise lawfully held. It is so ordered.

DATED AT NAIROBI THIS 29TH DAY OF FEBRUARY 2016

L. KIMARU

JUDGE

G.W. NGENYE-MACHARIA

JUDGE