REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.23, 24 & 31 OF 2015

(An Appeal arising out of the conviction and sentence of J.M. ONYIEGO - CM delivered on 19th January 2015 in Kiambu CM. CR. Case No.944 of 2013)

LEMMINGTON WANDERI……1ST APPELLANT

JOHN KARUGA MAINA……2NDAPPELLANT

DENNIS PAUL MWENDA……3RDAPPELLANT

VERSUS

REPUBLIC……RESPONDENT

JUDGMENT

Lemmington Wanderi (1st Appellant), John Karuga Maina (2nd Appellant) and Dennis Paul Mwenda (3rd Appellant) were jointly charged with **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**. The particulars of the offence were that on 21st April 2013 at Kamiti Corner in Kiambu County, the Appellants while armed with dangerous weapons namely pangas and rungus, jointly robbed David Ng'ang'a Kiongo of a motor vehicle registration No. KBK 827W Toyota Premio, two mobile phones (Nokia), one IPhone, one laptop (HP) and a Meko gas, and immediately before the time of such robbery used actual violence to the said David Ng'ang'a Kiongo (the complainant). The 3rd Appellant was further charged with **being in possession of stolen property** contrary to **Section 323** of the **Penal Code**. The particulars of the offence were that on 8th May 2013 at Dagoretti Nairobi County, having been detained by Cpl. James Bilisi and PC Chauton Muriithi as a result of the exercise of the powers conferred by **Section 26** of the **Criminal Procedure Code**, had in his possession the items listed in the charge sheet (being essentially electronic goods and mobile phones) which were reasonable suspected to have been stolen or unlawfully obtained. When the Appellants were arraigned before the trial magistrate's court, they pleaded not guilty to the charge. After full trial, they were convicted as charged on the 1st count of **robbery with violence**. They were sentenced to death. The 3rd Appellant was convicted of the 2nd count. His sentence was kept in abeyance pending execution of the first sentence.

The Appellants were aggrieved by their conviction and sentence. Each Appellant filed a separate appeal challenging his conviction and sentence. For the purpose of this appeal, the three separate appeals were consolidated and heard together as one. The Appellants raised more or less similar grounds of appeal challenging their conviction and sentence. The Appellants were aggrieved that they had been convicted on the basis of the evidence of identification that did not meet the required legal threshold. They took

issue in the manner in which the trial court evaluated the evidence adduced by the prosecution witnesses. In their view, the said evidence was contradictory and inconsistent and did not give any factual basis for the trial court to convict them. They faulted the trial court for shifting the burden of proof from the prosecution and thereby erroneously convicted them. They were aggrieved that the trial court had not taken into consideration their respective defences before arriving at the decision to convict them. In respect of the 2nd Appellant, he queried the decision by the trial court to the effect that the doctrine of recent possession applied in his case yet at the time of the recovery of the stolen item (mobile phone) no inventory had been taken. In the premises therefore, the Appellants urged the court to allow their respective appeals, quash their convictions and set aside the death sentence that was imposed on them.

During the hearing of the appeal, the three Appellants presented to the court written submission in support of their respective appeals. The Appellants also made oral arguments urging the court to allow their respective appeals. Ms. Nyauncho for the State opposed the appeal. She submitted that the prosecution had established to the required standard of proof beyond any reasonable doubt, by evidence of identification and recovery of the stolen items, that indeed the Appellants had robbed the complainant and in the course of the robbery injured his wife. She urged the court to dismiss the appeals. She was of the view that the appeals lacked merit.

This court shall revert to the grounds of appeal put forward by the Appellants after briefly setting out the facts of this case. The complainant was on the material time a resident of Kamiti Corner in Kiambu County. He resided in the house with his wife (PW2) Aidah Nyambura Kimani and his nephew (PW3) Wilson Kiongo Mwangi. The three witnesses testified that on 20th April 2013 at 4.30 a.m., they woke up to realize that a gang of robbers had gained entry into their house. PW1 and PW2 were woken up from their bed while PW3 was woken up in a nearby bedroom. PW3 was led into the couple's bedroom. The gang demanded that they surrender whatever money that was in their possession. Other than Kshs.500/-, PW1 did not have any cash in his possession. He indicated to the robbers that he was willing to transfer money that was in his M-pesa account to them. However, in haste to operate the phone, one of the robbers entered the wrong PIN number. The phone became blocked. The robbers started harassing PW2 and PW3. The complainant and PW2 were beaten by the robbers using the blunt side of the panga. PW2 offered to take the robbers to a nearby ATM so that she would withdraw money from her account. According to the said witnesses, by that time it was already 5.30 a.m. The robbers became jittery because daylight was approaching. They tied up the complainant, PW2 and PW3. They stole from them their mobile phones. They also stole from them a laptop (Sony), Meko gas, shoes and the complainant's wallet. They drove off in the complainant's motor vehicle registration No. KBK 827N Toyota Premio.

PW2 and PW3 testified that during the robbery, they were able to identify the persons who robbed them. The complainant (PW1) testified that he was not able to identify any of the persons who robbed them. PW2 told the court that he identified the 1st, 2nd and 3rd Appellants during the robbery. She explained the roles each of the two Appellants is said to have played during the robbery. Similarly to, PW3 identified 2nd and 3rd Appellants as being in the gang that robbed them on the material night. It was instructive that during the hearing before the trial court, it emerged that neither PW2 nor PW3 gave the physical description of the persons who attacked and robbed them in the first report that was made to the police. The OB report of the particular day of the robbery from Kiamumbi Police Station that was produced in court clearly shows that the two witnesses did not give the physical description of the persons who robbed them. However, as is the norm in such cases, the said witnesses testified that they told the police that they would be able to identify their assailants if they saw them again. Both witnesses confirmed in their evidence that they saw the persons who robbed them for the first time during the night of the robbery.

PW6 IP Erastus Ogutu then based at CID Kiambu, was requested by the investigating officer to conduct an identification parade. The suspect to be identified was the 3rd Appellant. PW6 testified that in the identification parade that he conducted on 11th May 2013, PW2 and PW3 identified the 3rd Appellant as being among the gang that robbed them. PW8 IP Wambua Mbithi then the Officer In-Charge Crime at Kiambu Police Station conducted another identification parade on 12th May 2013 where PW2 identified the 1st Appellant. PW3 was not able to identify the 1st Appellant in the identification parade. PW11 CIP Noah Maiyo the then OCS Kiambu Police Station conducted another identification parade on 11th May

2013 where the 2nd Appellant was identified by PW2. PW3 did not point him out in the identification parade.

After the report of the robbery was made, PW9 PC Christopher Gatembu then based at CID Kiambu was assigned to investigate the case. He used a facility provided by Safaricom Limited to try and trace the mobile phones which were robbed from the complainants. He testified that on 6th May 2013, he was able to trace one of the stolen mobile phones after it had been activated. The mobile phone, a Nokia belonging to PW2 was traced to PW5 Samuel Ndungu Githuru, a businessman based at Kiambu. When he was asked how he got the phone, he told the police that he had purchased the same from PW4 Paul Kamau Mwangi, a phone repairer within Kiambu Township. When PW4 was approached, he told the police that he had purchased the said phone from an acquaintance that he knew very well. This acquaintance is the 2nd Appellant. PW4 led the police to where the 2nd Appellant was. He was arrested and detained by the police. PW9 testified that, after interrogation, the 2nd Appellant led them to the house of the 3rd Appellant where the stolen items that appears in the 2nd count of the charge were recovered. Incidentally, although it was alleged that the items which were recovered in the house of 3rd Appellant were stolen, the complainant did not identify any of the recovered items as having been stolen from his house during the night of the robbery. Other than the said recovered items being said to be suspected stolen items, no one came forward, at least from the trial court's record to identify that the said recovered items were indeed stolen from them. The motor vehicle that was robbed from the complainant was recovered a few days after the robbery. It had been extensively vandalized. It was produced as an exhibit before the trial court.

When the Appellants were put to their defence, they denied participating in the robbery. They denied being found with any of the items which were robbed from the complainant. They narrated the circumstances of their arrest. The 2nd and the 3rd Appellant testified that the case against them was contrived by the police so as to implicate them for an offence that they did not commit.

This being a first appeal, it is the duty of this court to re-evaluate and to reconsider the evidence adduced before the trial court, in light of the submission and the grounds of appeal argued before this court, before arriving at its own independent determination whether or not to uphold the conviction of the Appellants. In **Erick Otieno Arum –vs- Republic [2006] eKLR** the Court of Appeal held thus:

> ***"It is now well settled, that a trial court has the duty to carefully examine and analyze the evidence adduced in a case before it and come to a conclusion only based on the evidence adduced and as analyzed. This is a duty no court should run away from or play down. In same way, a court hearing a first appeal (i.e. a first appellate court) also has a duty imposed on it by law to carefully examine and analyse afresh the evidence on record and come to its own conclusion on the same but always observing that the trial court had the advantage of seeing the witnesses and observing their demeanour and so the first appellate court would give allowance for the same."***

This court has carefully re-evaluated and re-assessed the evidence adduced before the trial court. It has also considered the grounds of appeal put forward by the Appellants in support of their respect appeals. As stated earlier in this judgment, the thrust of the Appellants' appeals is that the trial court applied the wrong principles of the law in assessing the evidence of identification that was adduced by the prosecution witnesses. The Appellants argued that their alleged identification by the prosecution witnesses was incredible since the witnesses who are alleged to have identified them did not give their respective physical descriptions in the first report that was made to the police. The prosecution argued that given that the robbery took more than one (1) hour, PW2 was in a possession to identify them. In any event, it was the prosecution's case that the said identification of the Appellants by PW2 and PW3 was confirmed in identification parades that were later carried out.

This court's re-evaluation of the evidence of identification leads it to the conclusion that it is unsafe to convict the Appellants on the basis of such evidence of identification. It is now settled that if the prosecution intends to rely on the evidence of identification to establish the charge against an accused person, the identifying witness is required to have given the description of his or her assailants in the first

report of the crime that was made to the police. It will not do for it to be recorded in the first report that the witness said he would identify the assailant if he had the opportunity to see them again. Of course, the requirement that the physical description of the assailant be recorded in the first report made to the police is not cast in stone. There are certain situations where a witness may have identified certain distinguishing marks in the assailant that would make such identification watertight.

In the present appeal, it was clear to this court that PW2's and PW3's alleged identification of the Appellants as being members of the gang that robbed them is not without an element of doubt. The reason for this court's conclusion is that the three witnesses who were the victims of the robbery narrated their different experiences to the court. Whereas the complainant (PW1) was not able to identify any of the robbers, PW2 identified all the Appellants as being in the gang that robbed them while PW3 identified two of the three Appellants. From their testimony, it was clear to the court that the gang terrorized their victims before they robbed them. In fact, they assaulted PW2 and injured her. This court warned itself that in such circumstances, it would not be possible for this court to find with certainty that indeed the Appellants had been properly identified. In **James Tinega Omwenga –vs- Republic [2014] eKLR** at Para 13 the Court of Appeal stated thus:

> ***"It is a well settled principle that evidence of visual identification in criminal cases can cause miscarriage of justice if not carefully tested. Where reliance is placed on a single identifying witness to convict, the law requires the evidence on identification to be weighed with greatest care. The court must satisfy itself that in all circumstances it is safe to act on such identification, particularly where the conditions favouring a correct identification are difficult."***

In the present appeal, this court cannot reach a finding, with certainty, that indeed the evidence of identification adduced by the prosecution witnesses is free from error. In that regard therefore, if there shall be no other evidence connecting any of the Appellants to the robbery, the prosecution would have failed to establish a case against such Appellant to the required standard of proof beyond any reasonable doubt. The identification parades which were later held by the police cannot cure the failures evident in the testimony of the identifying witnesses which was made in difficult circumstances that cannot rule out the possibility of mistaken identity.

In **Maitanyi –Vs- Republic [1986] KLR 198**, the Court of Appeal held that where the prosecution cannot, with assurance, rely on the sole evidence of identification to sustain a conviction, it must adduce other evidence to support such evidence of identification made in difficult circumstances. At Page 200 of the judgment, the Court had this to say:-

> ***"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, no other evidence other than the impugned evidence of identification was adduced against the 1st and the 3rd Appellants. The alleged stolen items which were recovered from the house of the 3rd Appellant were not connected to the robbery. The complainant did not identify any of the alleged recovered items as being among the items that were robbed from his house. There is no nexus between the robbery and the items that were found in the 3rd Appellant's house. As regard the 2nd Appellant, the

prosecution was able to adduce other strong culpatory evidence which connected him to the robbery. A mobile phone which was positively identified to have been robbed from PW2 on the night was recovered in the constructive possession of the 2nd Appellant. PW4 and PW5 gave testimony which connected the 2nd Appellant to the said mobile phone. The doctrine of recent possession applies in the case of the 2nd Appellant. The mobile phone was found in the 2nd Appellant's possession about a fortnight after the robbery. This period, for all intents and purposes was recent. It directly connected the 2nd Appellant to the robbery. He failed to give a reasonable explanation of how he came to be in possession of the particular mobile phone that was robbed from PW2. This court therefore holds that in respect of the 2nd Appellant, other than the evidence of identification, the prosecution adduced evidence which connected the 2nd Appellant with the robbery.

In the premises therefore, the appeal lodged by the 1st and 3rd Appellants challenging their conviction on the charge of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code** has merit. It is hereby allowed. That conviction is hereby quashed. The death sentence imposed on the 1st and 3rd Appellant is set aside. The 1st Appellant is ordered set at liberty forthwith and ordered released from prison unless otherwise lawfully held. As regard the 3rd Appellant, the prosecution established that he was found in possession of items which were clearly in his possession under circumstances that pointed to him having dishonestly acquired the same. He did not claim the said properties when the same were produced in court. His conviction by the trial court under **Section 323** of the **Penal Code** is therefore upheld. Since the trial court kept in abeyance the sentence under that charge, this court sentences the 3rd Appellant to serve two (2) years imprisonment with effect from the date of this judgment. The court has taken into consideration this cumulative period that the Appellant was in remand custody or was serving time while awaiting the conclusion of this appeal.

As regard the 2nd Appellant, this court having found that the prosecution proved 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, his appeal against conviction and sentence lacks merit and is hereby dismissed. The conviction and sentence of the trial court is hereby confirmed. It is so ordered.

DATED AT NAIROBI THIS 27TH DAY OF SEPTEMBER 2016

L. KIMARU

JUDGE