REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. 50 OF 2016 *[*consolidating Criminal Appeals Nos.49& 51 of 2016]

1. SAMSON MWINGIRWA

2. KENNEDY KIOGORA PAUL

3. MICHAEL MURUNGI THIMANGU.....APPELLANTS

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in criminal case NO. 402 of 2014 of the Principal Magistrate's Court at Isiolo by J.M. Irura – Senior Resident Magistrate)

JUDGMENT

The three appellants namely**, SAMSON MWINGIRWA, KENNEDY KIOGORA PAUL** and **MICHAEL MURUNGI THIMANGU ,** were convicted in two counts for offence of robbery with violence contrary to section 296 (2) of the Penal Code.

The particulars of the offence in count one were that on the 6th day of August 2014 at Sun Africa bar and Restaurant, in Isiolo County, jointly, while armed with pangas and rungus robbed **DAVID KINOTI** of cash Kshs. 700/= during the time of the said robbery used actual violence to the said **DAVID KINOTI**. In count two the particulars were that at the same place and time, they robbed **KARURU** several items all valued at Kshs. 100,000/= and at the time of the robbery fatally wounded the said **KARURU**.

The appellants were tried and convicted for the offences. They were sentenced to suffer death. They now appeal against conviction and sentence.

The 2nd appellant was represented M/s. Thibaru, learned counsel. The 1st and 3th were unrepresented. Each appellant had raised own grounds of appeal which can be summarized as follows:

1. That the learned trial magistrate erred in law and fact by failing to find that the appellants were not properly identified.

2.That the learned trial magistrate erred in law and in fact by convicting the appellant without sufficient evidence.

3. That the learned trial magistrate erred in law and fact by not considering the appellants' defence.

The state was represented by Mr. Odhiambo, the learned counsel. He conceded to the appeal by the

second appellant but opposed the appeals by the first and the third appellants.

The facts of the prosecution case briefly were as follows:

When some robbers struck at Sun Africa Bar and Restaurant, the victims recognized one of them. Later recoveries were made that linked the appellants to the offences.

The 1st appellant denied any involvement in the offence. He pleaded an alibi. The 2nd appellant gave an explanation as to how the recovered items found their way into his house. The defence of the 3rd appellant was an alibi.

This is a first appellate court, as expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated Case of **OKENO Vs. REPUBLIC 1972 EA 32.**

The incident that gave rise to this case occurred at about 2 AM. This being at night, I will endeavour to establish how the purported recognition came to be made and whether the said recognition was free from error. in doing so I will be guided by the guidelines that were prescribed by Lord Widgery, CJ in the celebrated case of **REPUBLIC VS TURNBULL [1976] 3 ALL ER 549** when he said:

> ***First, whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. In addition he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken.***
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> ***Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be make. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given o the police by the witness when first seen by them and his actual appearance? If in any case, whether it is being dealt with summarily or on indictment, the prosecution have reason to believe that there is such a material discrepancy they should supply the accused or his legal advisers with particulars of the description the police were first given. In all cases if the accused asks to be given particulars of such descriptions, the prosecution should supply them. Finally, he should remind the jury of any specific weaknesses which had appeared in the identification evidence. Recognition may be more reliable than identification of a stranger: but, even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relative and friends are sometimes made.***

I was not comfortable with the evidence of David Kinoti (PW1). Though he was called as a witness and probably his mention of some of the culprits helped in the arrests and subsequent recoveries, his conduct is very suspect. After the robbery, he decided to go to his sister's house from where he was arrested. In his evidence he never testified to have been injured in the course of the robbery nor did he testify of going to hospital to seek treatment. we first hear of his injuries from PC John Baptista Wanjiku (PW8) I highly doubt that he was a victim from his conduct. It would appear that he was part of the robbers. If he did not dupe the police, they may have decided to use him as a source of information. If the second theory is true then, they succeeded. Having said so, the conviction in count 1 cannot stand against all appellants.

Having dismissed the first complainant as unreliable, on the issue of identification we are left with what

the deceased is alleged to have uttered. This was testified to by PC Nixon Kiprop (PW6) and PC Baptista Wanjiku (PW8). The two said he was very weak at the time. This is why the trial magistrate decide to treat it as a dying declaration. Since this is not the evidence that was relied on in conviction, I will not bother to interrogate whether or not it amounted to what legally can be termed as a dying declaration.

This case mainly revolved around the doctrine of recent possession. The court of appeal in the case of **CHRISTOPHER RABUT OPAKA V R KISUMU CRIMINAL APPEAL NO. 82 OF 2004 (*unreported*)** spelled out the conditions to be followed before the doctrine is invoked as follows:

> ***"... It is trite that before a court of law 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 positive proof, first: that the property was found with the suspect, secondly that the property is positively the property of the complainant; thirdly, that the property was stolen from the complainant and lastly, 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 property can move from one person to the other. In order to prove possession there must be acceptable evidence as to search of the suspect and recovery of the allegedly stolen property, and in our view, any discredited evidence on the same cannot suffice no matter from how many witnesses."***

When the police officers went to the house of the first appellant on 6/8/2014, they recovered a video deck and an empty crate of beer. This is what PC Nixon Kiprop (PW6) testified to. The appellant signed the inventory of the items found in his house. these items were identified by PW2, the complainant as part of what was stolen during the robbery.

In the house of Michael Murungi the third appellant, PC Kiprop testified that they recovered a keg pump and a TV set. These items were identified by the complainant. He was also linked to the items that were recovered in the house of the second appellant. These were items that had been stolen during the robbery. He also signed the inventory of the items that were removed from his house.

The learned trial magistrate correctly invoked and applied the doctrine of recent possession in respect of the 1st and the 3rd appellants. There was overwhelming evidence against the two.

The second appellant gave an explanation as to how the complainant's items found their way into his house. He called his wife and daughter who supported his claim. This information was given to the police officers at the earliest opportunity. In **MALINGA V R [1989] KLR 225** Bosire, J (as he then was) expressed himself at page 227 as follows:

> ***"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 the 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."***

The burden that shifts to the accused person is on a balance of probabilities. The second appellant discharged that burden very well. The conviction was not therefore safe. The same is quashed and the resultant sentence is set aside. He is set at liberty unless if otherwise lawfully held.

The conviction in respect of the 1st and the 3rd appellants will not be disturbed except in respect of the first count as earlier indicated. To that extent only does their appeal succeed.

Dated at Meru 20th day of December 2016

KIARIE WAWERU KIARIE

JUDGE