



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NOS.55 & 59 OF 2012**

*(An Appeal arising out of the conviction and sentence of Hon. E. N. Nderitu, P.M. delivered on 17<sup>th</sup> February 2012 in Nairobi CM. CR. Case No.346 of 2010)*

**ERICK INGOHI LUEVO.....1<sup>ST</sup>  
APPELLANT**

**MOSES ONYANGO ONGULE.....2<sup>ND</sup>  
APPELLANT**

**VERSUS**

**REPUBLIC.....RESPOND  
ENT**

**JUDGMENT**

The 1<sup>st</sup> Appellant, Erick Ingohi Luevo and the 2<sup>nd</sup> Appellant, Moses Onyango Ongule were charged with three (3) others (who were however acquitted) with four (4) counts of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**. The particulars of the offence were that on the night of 31<sup>st</sup> January 2010 at Westlands road in Nairobi, the Appellants, jointly with others not before court, while armed with crude weapons namely an axe, pangas and a kitchen knife robbed Vinodlal Chagnilal Ruparel, Shilen Thakerar, Basri Shilen Thakerar and Benjamin Wambua Kimeu of various mobile phones, gold rings, bangles, gold necklaces, a laptop computer, a wrist watch, various currencies all totaling in value to approximately Kshs.3 million and a motor vehicle registration No. KBB 714P Toyota NZE saloon, and in the course of the robbery, killed Vinodlal Chagnilal Ruparel, seriously injured Shilen Thakerar and threatened to use violence to the Basri Shilen Thakerar and Benjamin Wambua Kimeu. The particulars of the stolen items were listed in the charge sheet. 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 the four (4) counts of robbery with violence. They were sentenced to death in respect of the 1<sup>st</sup> count. The death sentences in respect of the three other counts were kept in abeyance. The Appellants were aggrieved by their conviction and sentence and filed separate appeals to this court challenging their conviction and sentence.

Their separate appeals raised more or less similar grounds of appeal. They were aggrieved that they had been convicted on the basis of the evidence of identification and recognition made in circumstances that were not conducive for positive identification. The 1<sup>st</sup> Appellant was aggrieved that he had been convicted on the basis of the evidence of recognition in the absence of evidence of the first report made to

the police after the robbery incident. The 2<sup>nd</sup> Appellant was aggrieved that he had been convicted on the basis of the evidence of identification parade which in his view was not conducted in accordance with the law. Both Appellants took issue with the fact that the trial magistrate had relied on the application of the doctrine of recent possession without taking into consideration, firstly, that the said stolen items were not found in the 1<sup>st</sup> Appellant's possession and in respect of the 2<sup>nd</sup> Appellant, the prosecution had not adduced evidence to establish that the Nokia phone found in his possession actually belonged to the complainant. The Appellants were aggrieved that the trial magistrate had failed to take into account their respective defences before arriving at the decision to convict them. They were aggrieved that the trial court had relied on incredible, inconsistent and contradictory evidence of prosecution witnesses to arrive at the decision to convict them. They faulted the trial magistrate for convicting them on the basis of insufficient evidence which did not establish their guilt to the required standard of proof beyond any reasonable doubt. In the premises therefore, the Appellants urged the court to allow their respective appeals, quash their convictions and set aside the death sentences that were imposed on them.

During the hearing of the appeal, the two separate appeals filed by the Appellants were consolidated and were heard together as one. The Appellants presented to court written submission in support of their respective appeals. They urged the court to allow their appeals. This court shall revert back to the said submissions at the later part of the judgment. Mr. Kabaka for the State made oral submission urging the court to dismiss the appeals. He submitted that the prosecution had adduced sufficient credible evidence upon which the Appellants were convicted. Again, we shall refer to the submission made by the State later in this judgment.

Before giving reasons for our decision, it is imperative that we set out the facts of this case. On 31<sup>st</sup> January 2010 at about 9.30 p.m., PW4 Roop Vinodlal Ruparel drove from his residence in Westlands to Jomo Kenyatta International Airport to receive PW1 Shilen Thakerar, his brother in-law who was scheduled to arrive from Dar es Salaam. He was accompanied by PW1's wife, PW8 Basri Shilen Thakerar and their four (4) year old son. PW8 was six months pregnant at the time. They were using motor vehicle Registration No. KBB 714P Toyota NZE Saloon. According to the three witnesses, their journey from the Airport to PW4's father's house which was along Westlands road near Graffins College, was uneventful.

PW4's father was known as Vinodlal Chagnilal Ruparel (the deceased). He was 67 years at the time. He had employed the 1<sup>st</sup> Appellant as a night guard. According to PW1, PW4 and PW8, on reaching the compound, the 1<sup>st</sup> Appellant opened the gate for them. There was sufficient electric light at the gate which enabled them to recognize the 1<sup>st</sup> Appellant. According to the three witnesses, when they drove into the compound, and had parked the vehicle, they were welcomed by the deceased. He invited them inside the house to have supper. He was standing on the verandah as he was welcoming them. At that moment, the three witnesses testified that about three or four men emerged from the area surrounding the house and approached them. They were armed with crude weapons. They recalled seeing a knife, an axe and pangas. They ordered them to enter the house. As fate would have it, as they were about to enter the house, strong wind caused the front door to bang shut. The gang became agitated while demanding that the door be opened. The deceased told them that the door could not be opened from the outside unless he rang his wife to open the door from the inside. The gang became impatient.

One of the gang members stabbed the deceased on the neck as they were waiting outside for the door to be opened. Shortly thereafter, the door was opened by the deceased's wife. PW4 was hit with an object on his left eye. The assault on both the deceased and PW4 caused the two to bleed profusely. They were escorted inside the house before they were ordered to lie down. The gang ransacked the house and robbed the three witnesses and the deceased of their mobile phones, jewellery and various sums of cash. They also robbed the wife of the deceased of her mobile phone, her jewellery and her small carvings of animals made of metal used for prayers and which were in her small temple. She is Hindu. They also robbed PW4 of his laptop. After the robbery, they bound the two male witnesses. They escorted PW8 to a bathroom where they locked her up with her child. They locked the wife of the deceased in one of the bedroom. They ordered the victims not to move until after twenty (20) minutes. They took the key to the car and drove off from the compound.

After the gang of robbers had left, PW1, PW4 and PW8 raised alarm. They were rescued. They rushed the deceased and PW1 to MP Shah Hospital. The deceased had lost a lot of blood during the robbery ordeal. He was pronounced dead on arrival at the hospital. According to the post mortem was conducted by Dr. Wasike, the deceased died due to severe haemorrhage which was caused by a penetrating stab wound to the neck which severed the blood vessels on the neck. The post mortem report of Dr. Wasike was produced on her behalf by PW15 Dr. Okemwa Minda. PW9 PC Nicholas Kisavi was present at the hospital when post mortem was conducted by Dr. Wasike. PW4 was admitted for about two (2) weeks at MP Shah Hospital. When he was assaulted, the orbital nerve was damaged as a result of which PW4 lost complete sight of the left eye. He also sustained bleeding into the brain cavity. He was treated by PW13 Dr. Mubashir Mohmood Qureshi, a neurosurgeon and PW14 Dr. Ashola Kumar Shah, an eye specialist. The two doctors produced their respective medical reports in evidence which indicated that PW14 had sustained injuries of a permanent nature. The injury to his brain had caused PW14 to lose sensation on his right arm and leg.

The robbery incident was immediately reported to Parklands Police Station. PW16 PC Julius Mutembei was assigned to investigate the case. He visited the scene of crime at the deceased's residence accompanied by PW10 Corporal John Gikuri Momasi, a Scenes of Crime Officer. PW10 took photographs at the scene of crime. He also took photographs of the body of the deceased at MP Shah Hospital. He took photographs of motor vehicle registration No. KBB 714P after it was recovered by the police upon its abandonment after the robbery incident. All these photographs were produced into evidence by PW10.

According to PW16, PW1 and PW4 informed him, when they made the first report to the police that the 1<sup>st</sup> Appellant, their night guard was involved in the robbery. After opening the gate for them, the 1<sup>st</sup> Appellant was with the robbers when they were assaulted and robbed them. After the robbery incident, the 1<sup>st</sup> Appellant disappeared from the home. He was not seen until two (2) months later when he was arrested by the police with the assistance of his former employers at Kipkelion at his mother's house. His wife also lived there. According to PW16, when they arrested the 1<sup>st</sup> Appellant, they searched his house. They recovered a silver chain, assorted animal metal carvings used for Hindu prayers, a necklace, and a key holder. All these items were listed in an inventory which the 1<sup>st</sup> Appellant signed. These items were positively identified by PW1, PW4 and PW8 as among the properties that were robbed from the deceased's house on the material night of the robbery. The 1<sup>st</sup> Appellant was arrested and escorted to Nairobi where he was subsequently charged.

Meanwhile, PW7 PC Sospeter Njiru, a police officer then based at Kilimani CID Office, received information from an informer on 30<sup>th</sup> March 2011 to the effect that a person who had committed the particular robbery was within Adams Arcade market. PW7, accompanied by other police officers, went to the said market. The 2<sup>nd</sup> Appellant was pointed out to them. They arrested him. They found him in possession of two (2) Nokia mobile phones. He also had Rado wrist watch. He was escorted to Pangani Police Station. One of the Nokia mobile phones was positively identified by PW4 and PW8 as the one which was robbed from their mother. Although they did not produce any document to support their claim that the particular Nokia phone belonged to their mother, they however adduced evidence which established that the particular mobile phone in actual fact belonged to their mother. PW4 testified that he had customized his mother's phone so that her name appeared when the phone was switched on. They had also saved all the birthdays of the family members in the phone so that their mother remembered the particular anniversary dates. PW4 demonstrated this fact by switching on the phone. It showed the name of his mother. In it was saved the birthdays of all their family members. PW1 positively identified the wrist watch that was recovered from the 2<sup>nd</sup> Appellant. He produced the receipt that he used to purchase the particular wrist watch on 7<sup>th</sup> April 2005. The receipt indicated that the serial number on the wrist watch was 05868501. The particular wrist watch had the serial number 05868501. Upon the 2<sup>nd</sup> Appellant's arrest, an identification parade was mounted by PW5 Chief Inspector Duncan Muritani at Gigiri Police Station. In the parade, the 2<sup>nd</sup> Appellant was positively identified by PW1 as a member of the gang that robbed them on the particular night. The parade forms were produced in evidence.

PW2 Benjamin Wambua was at the material time employed by the deceased as a house servant. He recalled that on 31<sup>st</sup> January 2010 while he was relaxing at his room in the servant quarters, a gang of robbers attacked him. They blindfolded him and tied both his hands and legs. He was locked inside his room. He was not able to identify any of his attackers. He was robbed of his mobile phone. PW3 Alphonse Imbenzi was at the material time employed by Kiandui Security Company as a supervisor. He told the court that he recruited the 1<sup>st</sup> Appellant as a security guard on 4<sup>th</sup> December 2009. He recalled that he was introduced to the 1<sup>st</sup> Appellant by one Boniface Lumiti. A copy of the 1<sup>st</sup> Appellant's identity card was produced into evidence by PW3. He testified that after his recruitment, the 1<sup>st</sup> Appellant was assigned to guard the house of the deceased. The 1<sup>st</sup> Appellant was on duty at the particular house on 31<sup>st</sup> January 2010 when the robbery occurred. Immediately after the robbery, the 1<sup>st</sup> Appellant was not seen again. PW3 was instructed by a director of the company to assist the police with investigations. He accompanied the police to Kipkelion where they managed to arrest the 1<sup>st</sup> Appellant. PW3 reiterated that the 1<sup>st</sup> Appellant worked for them for the period in question until the day of the robbery incident.

When the Appellants were put on their defence, they both denied participating in the robbery. The 1<sup>st</sup> Appellant denied that he had been employed as a security guard by Kiandui Security Company. He denied that he was assigned to work at the house of the deceased. He insisted that he was a mason and was arrested by the police over a crime that he was not aware of. While admitting that he had given a copy of his identity card to one Boniface Lumiti to try and secure him a job as a security guard, he denied being employed as a security guard. He denied that the items produced in evidence by the prosecution were recovered from his house. He reiterated that he had not had any contact with the deceased and members of his family. On his part, the 2<sup>nd</sup> Appellant also denied robbing the complainants. He narrated how he was arrested by police on 31<sup>st</sup> March 2010 when he was working at his food kiosk. The police searched him and took away his two (2) Nokia phones and a wrist watch. He testified that he was tortured by the police in a bid to have him admit to the offence. He stated that the identification parade which was conducted by the police was undertaken contrary to the rules. He recalled that during the identification parade, the men in the parade with him were police officers. He was not allowed to wear both shoes. It was his evidence that he had been exposed to PW1 before the identification parade. He denied being found in possession of the particular mobile phone and Rado watch which were produced into evidence. He reiterated that he was a victim of police machinations to frame him in the crimes that were the subject of the trial.

This court, as the first appellate court, is required to look at the evidence adduced before the trial court afresh before arriving at its independent determination whether or not to uphold the conviction of the Appellants. In doing so, this court must be mindful of the fact that it neither saw nor heard the witnesses as they testified and therefore must give due allowance in that regard (See **Okeno –vs- Republic [1972] EA 32**). In the present appeal, the main issue for determination is whether the prosecution adduced sufficient evidence to secure the conviction of the Appellants on the charges of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**.

The prosecution relied on several pieces of evidence in its bid to secure the conviction of the Appellants on the charges brought against them. We have carefully re-evaluated the evidence adduced before the trial court. We have also considered the grounds of appeal put forward by the Appellants and the submissions placed before the court during the hearing of these appeals. The first piece of evidence that the prosecution relied on is the evidence of identification. In respect of the 1<sup>st</sup> Appellant, it was the prosecution's case that the 1<sup>st</sup> Appellant was at the material time employed as a night guard at the premises of the deceased. PW1, PW4 and PW8 all testified that the 1<sup>st</sup> Appellant had worked for them for a few weeks prior to the robbery incident. PW3, the security supervisor testified that, upon his employment, the 1<sup>st</sup> Appellant was assigned to guard the house of the deceased. On the material night of the robbery, PW1 and PW4 testified that it was the 1<sup>st</sup> Appellant who opened the gate for them. The two witnesses were able to clearly see him because there was security light. It was when they entered the compound that they were attacked by the gang of robbers. The 1<sup>st</sup> Appellant vehemently denied ever working for the deceased. He claimed that he was a mason who had wrongly been implicated in the

crime. Our re-evaluation of the evidence clearly leads us to the irresistible conclusion that indeed the prosecution established that the 1<sup>st</sup> Appellant was employed as a night guard in the house of the deceased by Kiandui Security Company. PW3 established that the 1<sup>st</sup> Appellant had been employed by the said company on 4<sup>th</sup> December 2009 and assigned to guard the house of the deceased. PW1, PW4 and PW8 testified that they developed a close relationship with the 1<sup>st</sup> Appellant prior to the night of the robbery. They knew him. They gave him supper on the days that he worked at their premises. It was clear to this court that the prosecution established to the required standard of proof that the 1<sup>st</sup> Appellant was on duty as a night guard on the night of the robbery.

The issue for determination by this court is whether the prosecution adduced evidence to connect the 1<sup>st</sup> Appellant with the robbery of the complainants. PW1, PW4 and PW8 testified that after the 1<sup>st</sup> Appellant had opened the gate for them, they found a gang of men inside the deceased's compound. It is our finding that it was the 1<sup>st</sup> Appellant who allowed access to the deceased's compound to the said gang of robbers. PW1 and PW4 testified that it was the 1<sup>st</sup> Appellant with three or four members of the gang who harassed them before escorting them into the house and then robbing them. The gang stabbed and fatally injured the deceased. They also seriously injured PW4. He lost sight of his left eye. After the robbery, the 1<sup>st</sup> Appellant disappeared from the deceased's house. He was not seen again until his arrest several weeks later at his rural home in Kipkelion. It is trite that where a person who was working in a particular place disappears from that workplace after the commission of a crime, the presumption is that he is the one who committed the crime unless he adduces exculpatory evidence to the contrary. It was clear from the evidence adduced by the prosecution witnesses that the 1<sup>st</sup> Appellant organized for the gang to rob the deceased. He was the one who gave them access to the compound. He disappeared from the scene after the robbery.

The other piece of evidence that connects the 1<sup>st</sup> Appellant to the robbery is the recovery of some of the items that were stolen from the house of the deceased. PW3 and PW16 testified that when they traced the 1<sup>st</sup> Appellant to his rural home, they recovered several items from his house that were stolen on the night of the robbery from the deceased's house. These items included: a silver chain, assorted animal metal carvings used for Hindu prayers, a necklace, and a key holder. All these items were positively identified to belong to the members of the family of the deceased. Upon recovery of the same, the 1<sup>st</sup> Appellant signed an inventory which established that indeed the said items had been recovered from his house. We hold that, applying the doctrine of recent possession, the 1<sup>st</sup> Appellant robbed the said items from the house of the deceased. The 1<sup>st</sup> Appellant denied that the particular items were recovered in his house. We formed the firm opinion that the 1<sup>st</sup> Appellant's denial did not displace the cogent, consistent and corroborated evidence that was adduced by the prosecution witnesses, particularly PW3 and PW16. The only reasonable finding to explain why the said items were found in 1<sup>st</sup> Appellant's possession is that the 1<sup>st</sup> Appellant stole them from the deceased's house. We cannot fault the trial magistrate for reaching the finding that indeed the prosecution had established its case against the 1<sup>st</sup> Appellant on 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. We find no merit with the appeal filed by the 1<sup>st</sup> Appellant against conviction. We proceed to dismiss it.

As regard the 2<sup>nd</sup> Appellant, the evidence that was adduced against him is that of identification and the recovery of some of the stolen items in his possession. It was the prosecution's case that during the robbery, PW1 identified the 2<sup>nd</sup> Appellant. PW1 testified that the robbery took about twenty (20) minutes. In the course of the robbery, there was electric light at the sitting room where they had been detained. PW1 testified that he was able to positively identify the 2<sup>nd</sup> Appellant because at the time he was apprehensive that the robbers would harm his pregnant wife who had been kept in another room. From his evidence, it was not clear whether he gave the description of the robbers in the first report that he made to the police. It was not clear how he was able to be positive that it was the 2<sup>nd</sup> Appellant who was in the gang of robbers that attacked them on the material night. The robbery took place on 31<sup>st</sup> January 2010. The identification parade was conducted on 8<sup>th</sup> April 2010. This was more than two (2) months after the

robbery incident. It has been held by several courts of record that an identification made in an identification parade is worthless unless the identifying witness gave a detailed description of the assailant in the first report made to the police. This description must include the distinguishing physical features of the assailant. It is therefore our holding that the evidence of identification relied on by the prosecution was not watertight enough to enable this court convict the 2<sup>nd</sup> Appellant.

However, that was not the only incriminating evidence that was adduced against the 2<sup>nd</sup> Appellant. The prosecution adduced evidence of recovery of the stolen items in the 2<sup>nd</sup> Appellant's possession. Upon his arrest, the 2<sup>nd</sup> Appellant was found in possession of a Nokia mobile phone and a Rado wrist watch which were positively identified by the complainants to belong to the wife of the deceased and PW4. The 2<sup>nd</sup> Appellant was arrested on 31<sup>st</sup> March 2010. This was two months after the robbery incident. PW4 was able to demonstrate that the Nokia mobile phone recovered from the 2<sup>nd</sup> Appellant belonged to his mother. He demonstrated this by switching on the mobile phone. When the mobile phone was switched on, what appeared on the screen was the name PW4's mother. The phone also had the birthdays of the members of the family of the deceased saved in it. As regard the Rado wrist watch, PW4 produced a receipt which confirmed that the wrist watch which was recovered from the 2<sup>nd</sup> Appellant was indeed his property. It had a Serial No.05868501 which tallied with the receipt produced in evidence by PW4. The doctrine of recent possession clearly applies in this case. As was held 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, it was clear that the trial court correctly applied the doctrine of recent possession to find the 2<sup>nd</sup> Appellant guilty of the charges that were brought against him. The 2<sup>nd</sup> Appellant did not offer any reasonable explanation how he came to be in possession of the said items that were stolen from the deceased's house on the night of the robbery. We hold that the fact that the 2<sup>nd</sup> Appellant was found with the said stolen items proved to the required standard of proof beyond any reasonable doubt that he participated in the robbery in question. His defence did not dent the otherwise strong evidence adduced against him by the prosecution witnesses. Taking into consideration the totality of evidence adduced against the 2<sup>nd</sup> Appellant, it was clear to this court the prosecution did indeed prove to the required standard of proof that the 2<sup>nd</sup> Appellant was a member of the gang that robbed the deceased on the material night.

The ingredients to establish the charge of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code** was established by the prosecution. The gang that robbed the deceased and members of his family consisted of more than one member, they were armed with dangerous and offensive weapons namely an axe, a knife and pangas. In the course of the robbery, they fatally injured the deceased and caused PW4 to sustain life altering injuries.

The upshot of the above reasons is that the respective appeals filed by the Appellants lack merit and is hereby dismissed. The conviction and sentence of the trial court is hereby upheld. It is so ordered

**DATED AT NAIROBI THIS 27<sup>TH</sup> DAY OF MAY 2015**

**L. KIMARU**

**JUDGE**

**G.W. NGENYE – MACHARIA**

**JUDGE**