REPUBLIC OF KENYA

IN THE HIGH COURT

AT HOMA BAY

CRIMINAL APPEAL NO. 1 OF 2015

BETWEEN

ROBERT OBARA LANGO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal

Case No. 582 of 2014 at Senior Resident Magistrate's Court at Mbita,

Hon. S. Ongeri, SRM dated on 15th January 2015)

JUDGMENT

1. The appellant, **ROBERT OBARA LANGO** and his co-accused were charged with robbery with violence contrary to **section 296(2)** of the ***Penal Code (Chapter 63 of the Laws of Kenya)*** and an alternative charge of handling stolen goods contrary to **section 322(2)** of the ***Penal Code***. The particulars of the principal charge were that on 10th January 2013 along Sindo-Nyagwethe road in Sindo area of Suba District within Homa Bay County jointly while armed with dangerous weapons namely stones and one toy pistol they robbed Washington Odera Ouma of Kshs. 130,000/- in cash and 1250 pieces of assorted Safaricom Airtime cards valued at Kshs. 28,500/- and immediately before and immediately after such robbery used actual violence on the said Washington Omondi Odera.

2. The particulars of the alternative charge against the appellant were that on 10th January 2013 to 11th January 2013 at Sindo Town in Suba District otherwise than in the course of stealing dishonestly retained 386 pieces of assorted Safaricom airtime cards and cash amounting to Kshs. 11,800/- knowing or having reason to believe them to be stolen property or unlawfully obtained.

3. The appellant was convicted on the alternative charge of handling stolen property and was sentenced to 7 years imprisonment. He now appeals against the conviction and sentence. As this is the first appellate court, we are enjoined to consider the entire evidence, evaluate it and reach an independent conclusion as to whether we should uphold the conviction bearing in mind that we neither heard nor saw the witnesses testify (see ***Okeno v Republic*** **[1972] EA 32**). In proceeding with this task, it is necessary to outline the material facts concerning the appellant as they emerged from the trial.

4. Washington Omondi Odira (PW 1) testified that he was Safaricom airtime dealer. On 10th January

2013 at 3.00pm he had gone to Nyagwethe to sell airtime and he was returning to Sindo. He had Kshs. 130,000/- in cash and airtime amounting to Kshs. 28,500/- which he carried on his motorcycle. While he was along the road he saw to persons standing by the road. The one dressed in a red t-shirt one was carrying a big stone and the other one wearing a blue t-shirt was holding a big stone. The man in a big stone hit him and when the motorbike fell, the man with a pistol threatened to shoot him. He screamed but no one came. A motorbike came a a dropped a motor pillion passenger and took off. The person in a red t-shirt took the bag he was carrying which contained his cash, safaricom cards and receipt books and all of them disappeared. He called his boss in Mbita who blocked all the cards. He sustained injuries on his knees and sustained a dislocation on his left shoulder. He went to Mbita District Hospital where he was treated. Duncan Oloo (PW 4), a clinical officer testified and produced the P3 form on behalf of Dr John Orwa. He confirmed that upon examination of PW 1 on 11th November 2013, he observed that the left upper back of scapula region was inflamed and right patella bruised. He opined that a blunt object was used to inflict the injury and classified the injury as harm.

5. On 11th January 2013, he was informed by the police that they had recovered money and the scratch cards. He proceeded to Sindo AP Camp where he identified the cards based on their serial numbers. He was also informed that cash was recovered from the suspects. A toy pistol was also recovered which resembled the one he saw at the scene. At the identification parade, he identified the two persons who hit him with the stone and the one who had a toy pistol. He identified the appellant as the person who had the toy pistol.

6. Corporal Paul Koech (PW 2), an officer stationed at Sindo District Officer's office testified that on 10th January 2013, he received the complaint by PW 1 that he had been attacked and his cash and airtime cards stolen. He testified that on 11th January 2013 at about 11.00pm, he received information that the attackers were staying in a house in Sindo Town. He and other officers were led by an informer to the house of the 3rd accused who was arrested. They received further information that the other accused were staying at another house. They proceeded there and found the appellant and the fourth accused. In that house, they conducted a search and recovered a black bag with while colour a toy pistol written Iwata wider 61 and scratch cards worth Kshs. 21,400/-. He arrested the two and escorted them to the DO's office. They received another report that the 2nd accused was staying at a lodge in Sindo. They recovered Kshs. 7,000/- and safaricom cards worth Kshs. 9,000/-. The Commanding Officer at Magunga Police Station was alerted.

7. Inspector Stephen Kimunya (PW 3) was at the material time the Deputy Commanding Officer of Magunga Police Station. He recalled that on 11th January 2013, he received information from Sindo Administration Police that 5 suspects had been arrested for involvement in a robbery with violence at Nyakwara. As the investigating officer, he took custody of the suspects and the exhibits that were recovered and commenced investigations. He issued the PW 1 with the P3 form and caused an identification parade to be conducted by Chief Inspector Marko Pologis on 12th January 2013 at 1520Hrs where the appellant was identified. The Chief Inspector also carried out the identification parade for two other accused. He prepared an exhibit memo for the toy pistol which he forwarded to the ballistic experts in Nairobi. He received a report dated 29th January 2013 from the Firearms examiner who stated the toy gun which was an Iwata Spray gun model Wider-61 manufactured in America was not a firearm as defined in terms of the ***Firearms Act (Chapter 114 of the Laws of Kenya)***. Based on the evidence and his inquiries, he proceeded to charge the suspects.

8. APC Philip Kipchirchir Tergut (PW 5), an officer from Sindo AP Camp, testified that he was at the station on 10th January 2013, when PW 1 made a report that he had been attacked by 4 people. He advised PW 1 to go hospital as he had injuries on his knees and on the left shoulder. At about 1.30pm, he also received a report that the suspects were hiding at Sindo. At Sindo, they found the appellant and another accused hiding in a house where they recovered safaricom scratch cards, money and a toy pistol. The suspects were arrested and escorted to Sindo AP Camp.

9. When the appellant was placed on his defence, he elected to give a sworn statement. He denied that he

was involved in the robbery and that he knew PW 1. He testified that on 10th January 2013, he left Nairobi at 9.00pm and arrived at Homa Bay at around 2.00am on 11th January 2013 to attend a funeral of his friend, Fredrick Ochieng Ogolla. From Homa Bay he took a Probox to Sindo. He arrived at Sindo after about 2 hours and on his way to rest at a lodging he met a group of policemen who interrogated him, searched took away his mobile phone, Kshs. 6,000/- and receipts from his wallet. The officers frog marched him to Sindo Market while they conducted a search. He was joined by four other people and escorted to the AP Camp. Thereafter he was taken to Mbita Police Station where he stayed for 2 days without being informed of the reason of his arrest and was subsequently charged for robbery with violence.

10. From the evidence, the learned magistrate found that the prosecution had proved its case against the appellant. While he convicted the appellant, the 2nd co-accused was acquitted. The appellant now appeals against the conviction and sentence.

11. The gravamen of this appeal as set out in the petition of appeal filed on 20th January 2015. In summary the ground of appeal are that the learned magistrate failed to acquit him after faulting the identification parade, that the there was no evidence that he was found with the stolen safaricom cards either in the lodging or the residential house where the cards were found, that there was contradiction in the evidence of the investigating officer and the arresting officer regarding the manner of his arrest, that there was manifest bias in the manner in which the learned magistrate handled the case as the 2nd accused was acquitted on the same evidence that led to the conviction of the appellant and that the learned magistrate shifted the burden of proof on the appellant. The appellant reiterated these points in his oral and written submissions.

12. Mr Oluoch, learned counsel for the respondent, opposed the appeal. He submitted that the robbery occurred at 3 pm in broad daylight and the accused was identified, armed with an instrument resembling a gun. That the appellant was arrested in possession of safaricom scratch cards which were identified by the appellant and which the appellant did not lay any claim to the recovered items. As the appellant was found in possession of the stolen items, counsel submitted that he ought to have been found guilty of robbery with violence. Counsel, submitted that the appellant was identified at the parade and that in light of the entire evidence, the court below erred in failing to convict the appellant of robbery with violence.

13. We have evaluated the evidence. We find and hold that the essential elements of robbery with violence were proved by the prosecution. We find that indeed the complainant was robbed and that he suffered violence at the hands of the assailants. The testimony of the assault was corroborated by that of PW 5, who took the first report at Sindo AP Camp and advised him to go to hospital, and PW 4, who confirmed that the PW 1 was attended to at the hospital on 11th January 2013 and who produced the P3 form confirming the injuries sustained. Likewise, the complainant's testimony was credible his cash and safaricom scratch cards were stolen during the robbery.

14. The main issue for consideration is whether the appellant was one of the assailants. The prosecution case is founded on the fact that the appellant was identified as one of the assailants who attacked and stole from PW 1 and that he was found in possession of recently stolen property.

15. On the issue of identification, we remind ourselves that the test in law is that the while a conviction may be based on the evidence of identification by a single witness, the court must be satisfied that the conditions under which identification took place were favourable and eliminated the possibility of mistaken identity (see ***Abdalla Bin Wendo v R*** **[1953] 20 EACA 166** and ***Samuel Gichuru Matu v Republic*** **CA NRB Criminal Appeal No. 88 of 2000 (UR)**).

16. In this case, although the attack took place in broad daylight, PW 1 only identified the assailants by their manner of dress. He did not give any other special identifying features. PW 5, who received the first report, did not mention any description given to him by PW 1 other than PW 1 reported that he was attacked by 5 suspects. Even if the accused knew the assailants, by their appearance, we think that an identification parade was crucial in identifying the assailants as the PW 1 did not know who they were.

The parade carried out by Chief Inspector Poligis who was not called as a witness. No reason was proffered by the prosecution why the witness could not be called. In the circumstances, the testimony of PW 3, the investigating officer, was insufficient to establish how the parade was carried out. The learned magistrate correctly relied on the decision of the Court of Appeal in ***Ibrahim Kigame Ngevi and Another v Republic*** **[2011]eKLR**, where it stated that,

> *In the absence of the officer who conducted the identification parade and the parade forms nothing remained before court other than dock identification which is worthless conviction could not therefore proceed on that evidence alone.*

17. In the circumstances, we hold and agree with the learned magistrate that the evidence of identification was implicating the accused was insufficient to connect the appellant with the robbery.

18. In order to secure a conviction, the prosecution could only on the evidence of recent possession to establish that the cards and the cash belonging to PW 1 were recovered from the appellant. In ***Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga -vs- R*** **NYR CA Criminal Appeal No. 272 of 2005**, the Court of Appeal stated that;

> *It is trite that before a court of law can rely on the doctrine of recent possession as a basis for 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.*

19. Upon evaluation of the evidence, we are satisfied that PW 1 identified the cash and safaricom scratch cards that were stolen from him. The appellant contests the fact that the said items were recovered from him when he was arrested. PW 2 testified that he arrested the appellant with the 4th accused in a house in Sindo where they recovered a toy pistol and safaricom scratch cards. The other witness present, PW 5, also testified that when they went to the second house, they found the appellant and the 4th accused where they recovered the safaricom scratch cards, cash and toy pistol.

20. The appellant raised three issues regarding the evidence. First, he stated that there was contradictory evidence between the appellant and the arresting officer and the investigating officer, PW 3. We find that that the testimony of the two officers, PW 2 and PW 5 was sufficient to establish the manner of arrest and recovery of the stolen items and any testimony by the investigating officer on the manner of arrest was not better evidence of the primary witnesses in the circumstances.

21. The second issue raised by the appellant is that there was no inventory of the recovered items produced. The preparation of an inventory is a procedural issue hence in ***Leonard Odhiambo Ouma & Another v Republic*** **CA NKU Criminal Appeal No. 176 of 2009 (UR)**, the Court of Appeal held that,

> *Failure to compile an inventory as contended in ground 5, is in our view a procedural step which in the circumstances, did not prejudice the appellants in any way and for this reason the omission did not vitiate the trial.*

22. Thirdly the appellant contends that the landlord of the premises or the owner of the hotel ought to have been called to confirm his presence where the items were recovered. **Section 143** of the ***Evidence Act*** states, *"No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for proof of any fact."* Hence it is not necessary to call all or any particular witness. However, in ***Bukenya and Others v Uganda*** **[1972] EA 549**, the Court held that that where essential witnesses were not called, the court was entitled to draw an inference that if their evidence had been called, it would have been adverse to the prosecution case. In this case, the evidence appellant having been arrested with recently stolen property was proved by PW 2 and PW 5. There is no suggestion in the evidence the landlord of the house where the appellant was found was present or that if called he would

give exculpatory testimony. We find that the testimony of landlord would not add or subtract anything from the prosecution case.

23. Upon appraisal of the entire evidence we find that the appellant was found with recently stolen property, to wit, scratch cards so soon on the next day after the robbery had taken place. In ***Hassan v Republic*** **[2005] 2 KLR 11** regarding recently stolen goods, the Court held that;

> *Where an accused person is found in possession of recently stolen property in the absence of any reasonable explanation to account for this possession a presumption of fact arises that he is either the thief or a receiver.*

24. While the appellant stated he had Kshs. 6,000/- in cash, he did not lay claim to the cards. Furthermore in light of the prosecution evidence, the appellant's defence that he was not found and arrested with the stolen items is dismissed. We therefore find and hold that the prosecution established all the elements of the doctrine of recent possession.

25. Before hearing the appeal, the appellant was warned that in the event the appeal was not successful, the respondent would seek to alter the finding and enhance the sentence. This is consistent with the practice prescribed by the Court of Appeal in the case of ***JJW v Republic*** **Kisumu CA Cr. Appeal No. 11 of 2011 [2013]eKLR** held that;

> *It is correct that when the High Court is hearing an appeal in a criminal case, it has powers to enhance sentence or alter the nature of the sentence. That is provided for under Section 354 (3) (ii) and (iii) of the Criminal Procedure Code. However, sentencing an appellant is a matter that cannot be treated lightly. The court in enhancing the sentence already awarded must be aware that its action in so doing may have serious effects on the appellant. Because of such a situation, it is a requirement that the appellant be made aware before the hearing or at the commencement of the hearing of his appeal that the sentence is likely to be enhanced. Oftentimes this information is conveyed by the prosecution filing a cross appeal in which it seeks enhancement of the sentence and that cross appeal is served upon the appellant in good time to enable him prepare for that eventuality. The second way of conveying that information is by the court warning the appellant or informing the appellant that if his appeal does not succeed on conviction, the sentence may be enhanced or if the appeal is on sentence only, by warning him that he risks an enhanced sentence at the end of the hearing of his appeal.*

26. Having been satisfied that the prosecution proved the offence of robbery with violence, we exercise our power under **section 354(2)(a)(ii)** of the ***Criminal Procedure Code (Chapter 75 of the Laws of Kenya)*** to alter the finding and enhance the sentence (see ***Rashid Mwinyi Nguisa & Another v Republic*** **MSA CA Criminal Appeal No. 45 of 1997 [1997]eKLR**).

27. We therefore set aside the appellants conviction for the offence of handling stolen goods and substitute the same with a conviction for the offence of robbery with violence contrary to **section 396(2)** of the ***Penal Code***.

28. There is only one sentence prescribed under section **296(2)** of the ***Penal Code*** and it is that of death. We hereby sentence the appellant to death. The appeal is dismissed.

DATED and DELIVERED at HOMA BAY this 27th day of July 2015.

D.S. MAJANJA **E. C. MWITA**

JUDGE **JUDGE**

Appellant in person.

Mr Oluoch, Senior Assistant Director of Public Prosecutions, instructed by the Office of Director of Public Prosecutions for the respondent.