



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**CRIMINAL DIVISION**  
**CRIMINAL APPEAL NO. 123, 124, 125, 126, 138 & 139 (CONSOLIDATED) OF 2014**

**MARTIN MWANGI .....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**JUDGMENT**

1. The Appellants herein 1. **WYCLIFF KADIBA** 2. **MARTIN MWANGI** 3. **RAPHAEL MUTUA** and 4. **KENNEDY KISALI** were convicted and sentenced to death for the offence of robbery with violence contrary to **Section 295** as read with Section 296(2) of the Penal Code the particulars of which were that on the 1<sup>st</sup> day of June, 2013 at Githurai Kimbo within Nairobi County jointly with others not before the court robbed **IRENE WANGARE GITUNDU** of cash Ksh.120,000 and assorted household goods all valued at Kshs.400,000/- and at the time of such robbery or immediately after threatened to use actual violence to the said **IRENE WANGARE GITUNDU**.

2. Being aggrieved by the said conviction and sentence they each filed respective appeals which appeals were consolidated for the purposes of the trial and determination and in which they raised grounds which can be summarized as follows:-

- a) The appellants were not positively identified
- b) The doctrine of recent possession was not properly applied
- c) Their defences were not considered.
- d) The prosecution case was not proved beyond reasonable doubt.

3. When the appeals came up for hearing before us the 1<sup>st</sup>, and 4<sup>th</sup> Appellants who were unrepresented filed what they termed additional amended grounds of appeal and written submission while the 3<sup>rd</sup> and 4<sup>th</sup> appellants filed written submission through Mr. Musinde Advocate which they relied upon. Mr. Muriithi appeared for the state and conceded to the appeals.

4. We must however point out that notwithstanding the fact that the appeals are conceded to, we are

required to re-evaluate the evidence tendered before the trial court and to come to our own conclusion through taking into account the fact that we did not have the advantage of seeing and hearing the witness.

## **SUBMISSIONS**

5. It was submitted by the 1<sup>st</sup> appellant that his identification was not safe taking into account the fact that the offence was allegedly committed at night and that the prevailing conditions were difficult for identification. In support of this submission the case of **PETER KIMARU MAINA v REPUBLIC CR. APPEAL NO. 11 of 2003 NYERI**. It was further submitted that the prosecution witnesses did not give the source of light its intensity and their allocation in relation to the alleged attackers.

6. It was further submitted that his conviction was based on the doctrine of recent possession on the basis that he was arrested in a house but no inventory of the items recovered was produced nor was there any evidence to show that the said house was his. It was therefore submitted that the circumstance upon which the court can rely on circumstantial evidence were never met.

7. On behalf of the 4<sup>th</sup> Appellant it was submitted that the charge sheet did not comply with the provisions of Section 134 and 137(a) of the Criminal Procedure Code. It was submitted further that the prosecution case was based upon evidence of identification which evidence was not watertight to justify a conviction. It was submitted that the circumstances prevailing were not ideal for identification and that none of the prosecution witnesses gave description of any of the attackers to the police in their first report. It was further submitted that although the witnesses did not know the assailants prior to the incident of robbery no identification parade was held. In support thereof the following cases were submitted.

**a) EZEKIEL AGWENYI v REPUBLIC Nairobi High Court Criminal Appeal No. 124 of 1999.**

**b) MAITANYI v REPUBLIC (1986) KLR**

**c) JAMES TINEGA OMWANGA v REPUBLIC CA CR. APP. NO 143 OF 2011**

8. It was further submitted that no evidence was tendered by the prosecution to prove that the house in which the complainant's stolen items were recovered belonged to him. In support of the submission that the ownership of the house had not been established the appellant relied upon the following cases:-

**a) OMAR SAID OMAR ALIAS AHMED ALI MOHAMED v REPUBLIC Nairobi High Court CR. Appeal No. 169 of 2006.**

**b) JOHN NJAGI KADOGO & 2 OTHERS v CR. Appeal No. 64 of 2014.**

9. It was further submitted that the appellant was arrested on the strength of information given by an informer who was not called as a witness and therefore the evidence did not have evidential value. In support of this submission the following cases were submitted:-

**a) PETER WEKESA & ANOTHER v REPUBLIC CR. Appeal No. 144 of 1995**

**b) PATRICK KABUI MAINA & OTHERS v REPUBLIC CR. Appeal No. 9 of 1986.**

10. On behalf of the 2<sup>nd</sup> and 3<sup>rd</sup> appellant it was submitted that the complainant was assisted in identifying the appellants and that it was necessary to conduct an identification parade before exposing the appellants to PW1., since the condition prevailing at the time of the alleged commission of the offence were not ideal for proper identification. It was further submitted that vital witness who would have reinforced the complainant's evidence on the identification of the 3<sup>rd</sup> Appellant was not called and therefore the court should make an inference that the said evidence would have been adverse to the prosecution case.

11. It was submitted that the standards upon which a trial court can convict an accused person on the strength of identification by a single witness were not met. In support of this submission the following cases were relied upon:-

**a) *RAPHAEL MWAZIGO NDAUIRO & Others v REPUBLIC High Court of Kenya at Mombasa Cr. App. No. 152, 153 & 154 of 2005.***

**b) *NAPHTALI NJERU IRUNGU v REPUBLIC High Court at Nairobi CR Appeal No. 1334 of 2002***

**c) *EPHANTUS LUTOLUAI v REPUBLIC (2013) eKLR***

12. It was therefore submitted that the trial court misdirected himself and occasioned a grave miscarriage of justice in convicting the appellant for an offence which they denied committing and therefore the appeals should be allowed.

13. In conceding to the appeals Mr. Muriithi submitted that the alleged offence herein occurred in the house of the complainant at about 1.30 a.m. and that the robbers had switched off the lights in the complainant's bedroom while the lights in the other room were off and that since the appellants were not known to the witnesses identification parade should have been conducted against each of the appellants herein taking into account how the Appellants were arrested.

14. It was further submitted that the appellants were not placed at the scene of the crime and that the doctrine of recent possession of stolen goods would only have been applied if there was proof of the ownership of the goods.

15. This being a first appeal, we are required to re-evaluate the evidence tendered before the trial court which we herein do:- it was PW1's evidence that on the night of robbery when she was getting out of her bedroom she saw the leg of a person wearing green socks and she quickly went into her toilet locked herself in and she started screaming for help through the bedroom window when the 4<sup>th</sup> appellant opened the door and dragged her out of the toilet and took her to the bedroom before the 1<sup>st</sup> Appellant came and started breaking the light bulbs in the corridor after the 4<sup>th</sup> Appellant had switched off the bedroom light.

16. It was her further evidence that the 4<sup>th</sup> appellant who was wearing a hat slapped her and ordered her to produce all the money inside the house. It was her evidence that 4<sup>th</sup> Appellant dragged her into the bedroom and ordered her to get on top of the bed, tore her night dress and then struggled with her to remove it and that she could see the four men properly using the sitting room light which was on throughout. She stated that the robbers were there for a period of three hours up to 4.30 a.m. After the robbery they were able to recover a black sweater inside the compound which the 1<sup>st</sup> Appellant was wearing and a black jacket which the 4<sup>th</sup> Appellant was wearing. She reported the incident to the police and on 3/6/2013 was called to the police station to identify items which had been recovered where upon arrival she saw the four Appellants at the inquiry desk who she immediately identified as those whom had robbed her.

17. **PW2 ELSA ADHIAMBO's** evidence is that she heard PW1 screaming and was filled with lots of fear. Shortly a man came into her bedroom and asked for her phone which she dropped on the floor but was able to see his face from a spot light he was using. She was ordered to remain in the bedroom and cover her head. Shortly she peeped through the door and was able to see the 1<sup>st</sup> Appellant since the sitting room lights were on.

18. **PW3 COLLINS KAGUCHO** stated that when he woke up and got out of his room he saw the 4<sup>th</sup> Appellant holding the door handle to PW1's bedroom then the 1<sup>st</sup> Appellant appeared holding wooden post and ordered him back to his room. He stated that while under the bed he was able to see the 4<sup>th</sup> Appellant entering his mother's bedroom. It was his evidence that his bedroom lights were on as well as

the lights on the corridor and sitting room.

19. **PW 4 PC FRANCIS MAKAU** stated that on 3<sup>rd</sup> June, 2012 received on information report on some four young men who were suspected of criminal activities at night while during the day time they would remain indoors, they proceeded to the said house and arrested the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Appellant for failing to give an adequate explanation on how they acquired the goods in the house. They took the goods therein and locked the house using their own padlock. Later on they received information that the 4<sup>th</sup> Appellant went back to the said house broke the padlock and was inside the house, they proceeded to the said house and arrested the 4<sup>th</sup> Appellant who was positively identified by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Appellant as their housemate.

20. PW 1 subsequently identified the said goods as having been stolen from her house on the night of the robbery herein. This evidence was corroborated by **PW 5 PC BERNARD NZIUKI** and **PW 6 PC GILBERT TALAM**.

21. When put on their defence the 1<sup>st</sup> Appellant stated that on 3<sup>rd</sup> June, 2013 he woke up at 5.00 a.m. to go to work when he was confronted by four men who identified themselves as Police Officers who led him inside a house that had two occupants and told to sit down, before being taken to the Police Station and that he had not known the two men before. The 2<sup>nd</sup> Appellant offered no defence while the 3<sup>rd</sup> Appellant also stated that he was arrested by the Police Officers on his way to work and ordered him to lead them to his house where nothing unlawful was found.

22. The 4<sup>th</sup> Appellant testified on oath that on 3<sup>rd</sup> June, 2013 at about 12.00 p.m. two police officers went to his shop and told him to give them money and once he told them that he did not have money, they arrested him together with his customers for failure to give the police money.

23. In convicting the Appellant based on identification the trial court had this to say: -

***“All the three eye witnesses have stated that the house was lit by electricity. They have all stated that the light in the sitting room remained on during the entire robbery incident, PW 1 stated that the light in her bedroom was on when the 4<sup>th</sup> Accused confronted her there. PW 3 stated that he switched on his bedroom lights when he woke up and was able to clearly see the 1<sup>st</sup> Accused and the 4<sup>th</sup> Accused. PW 2 stated that she was able to see the 1<sup>st</sup> accused by the electricity light in the sitting room and the 4<sup>th</sup> Accused by the touch light that he was holding when he came into her bedroom. I am satisfied that the lighting was sufficient to allow the witness see the accused person well”***

#### **DETERMINATION**

24. From the submissions and proceedings herein, we have identified the following issues for determination in these appeals: -

- a) Whether the Appellants were adequately identified at the scene.
- b) Whether the doctrine of recent possession is applicable to the prosecution case herewith.
- c) Whether the prosecution case against the Appellant was proved beyond reasonable doubt.

25. On the issue of the identification of the Appellants by the prosecution witness; whereas it was submitted by the Appellants and conceded to by the state that the conditions prevailing at the time of the alleged robbery were not ideal for identification, upon an analysis of the evidence of witnesses and whereas it is true that no identification parade was conducted when the Appellants were arrested, from the evidence of PW1 it is clear that the same was with the 4<sup>th</sup> Appellant of a considerable period of time. Who ordered her to produce all the money in her house and he took Ksh.80,000/- from her handbag and

further Ksh.40,000/- from the bed drawer before lifting the bed and removing her mobile phone which she had hidden under the mattress. He further attempted to rape her in the process tore her night dress which was produced as an exhibit. It is also on record that the Appellants stayed with the witnesses for a period of three hours during which the lights in the sitting room and corridor were on, through which she was able to identify the 1<sup>st</sup> Appellant.

26. PW1's evidence was corroborated in material particulars by PW2 and PW3. We are, therefore, of the considered view that the conditions prevailing were ideal for the identification of the 1<sup>st</sup> and 4<sup>th</sup> Appellants and are therefore not persuaded by the submission by the Appellants and the state that the prosecution witnesses could not be able to identify the Appellants and that is why PW1 was able to identify them at the Police Station.

27. We have also noted that the trial magistrate convicted the appellant having warned herself of the special need to exercise caution when convicting on the basis of identification of the Appellants and therefore find no fault with the holding on the identification of the Appellant by the prosecution witnesses.

28. On the issue of the doctrine of recent possession of stolen goods, this doctrine is applicable where the prosecution has established that the appellant had been in possession of goods/property stolen from the Complainant which property has been positively identified by the complainant and the appellants are unable to offer a suitable explanation as to how they came into possession of the said goods as was stated in the cases of **MATU v Republic 2004 (i)KLR** and **ARUM v Republic Court of Appeal at Kisumu Criminal appeal No. 85 of 2005**.

29. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Appellant were arrested by **PW 4 PC FRANCIS MAKAU** and **PW5, PC BERNARD NZIOKI** from a house where the stolen goods were found and that the 4<sup>th</sup> Appellant later went to the said house and was arrested having broken the padlock which the witnesses had placed on the door and that the 4<sup>th</sup> Appellant identified himself as Ken to the said witnesses. The Complainant was able to identify all her goods the Appellants having offered no adequate explanation how they acquired the said goods.

30. Since the said goods were found in possession of the Appellant two days after the Robbery even if we were to be wrong on our finding that the Appellants were adequately identified we find that the appellants would have been convicted on the doctrine of recent possession had the trial court applied her mind to the same. On the basis of the evidence of PW4, PW5 and PW6 who identified and their evidence was not rebutted that the appellants were arrested acting on information that they had received on the activities of the appellants herein and that upon interrogation the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Appellant confirmed that the house wherein they were arrested and the stolen items found belonged to the 4<sup>th</sup> Appellant who confirmed the same information when he was later arrested.

31. Taking into account the fact that the complainant and the prosecution witnesses had stated that they were attacked and robbed by four people whom they were able to identify at the police station upon the appellant being arrested and the same having offered no explanation as to how they came into possession of the stolen property, we find that it is safe to make an inference that they were the robbers who attacked the complainant.

32. We have further looked at the defences of the appellant against the prosecution evidence and in particular the evidence of the arresting officers and agree with the finding of the trial court that the same do not hold water and was therefore rightly dismissed.

33. We are therefore satisfied that the prosecution case against the appellants was proved beyond a reasonable doubt, all the elements of the offence of robbery with violence having been proved and therefore find no merit on the appeal herein both on conviction and sentence which we hereby dismiss.

**DATED, SIGNED and DELIVERED** at Nairobi this 24<sup>th</sup> day of November, 2015.

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**J. WAKIAGA**

**JUDGE**

.....

**G.W. NGENYE-MACHARIA**

**JUDGE**

***In the presence of***

*1<sup>st</sup> and 4<sup>th</sup> appellants in person*

*Mr. Masinde advocate for 2<sup>nd</sup> and 3<sup>rd</sup> appellants*

*Mr. Mwendwa for the state*

*Tabitha - Court clerk*