REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL NO. 306 OF 2011

PAUL NJOROGE THUO…….....….APPELLANT

Versus

REPUBLIC…….……RESPONDENT

[Being an appeal from the original conviction and sentence by Hon. K.A. Bidali S.P.M. dated 15th November, 2011 at Milimani SPMCCR Case No. 1986 of 2009.]

JUDGEMENT

The appellant was charged, convicted and sentenced on three counts of offence of robbery with violence contrary to S.296(2) of the Penal Code, Chapter 63, Laws of Kenya.

The particulars of count one are that on the night of 24th October, 2009 at Whistling Thorns Club, Kiserian, within Kajiado District in Rift Valley province, jointly with others not before court, while armed with dangerous weapons namely an AK 47 riffle, knives and rungus, robbed Mrs. Marie Louise Boley of 1 sonny video recorder, 3 cameras, 5 Nokia mobile phones, 2 binoculars, maglite torch, 1 Swiss army knife, cash, Kshs.47,475/- US dollars 840, Euros 50, UK Pounds 40 all valued at Kshs 130,470/-, and or immediately before or immediately after the time of such robbery used actual violence on the said Mrs. Marie Louise Boley.

The particulars of count two are that on the night of 24th October 2009 at **Whistling Thorns Club**, Kiserian, within Kajiado district in Rift Valley province, jointly with others not before court, while armed with dangerous weapons namely an AK 47 riffle, knives and rungus, robbed **Hildah Mwendia Mugo** of cash, Kshs.3,800/- and a purse all valued at Ksh.4,800/- and at or immediately before or immediately after the time of such robbery used actual violence on the said **Hildah Mwendia Mugo.**

The particulars of count three are that on the night of 24th October 2009 at **Whistling Thorns Club**, Kiserian, within Kajiado district in Rift Valley province, jointly with others not before court, while armed with dangerous weapons namely an AK 47 riffle, knives and rungus, robbed **Dr. Titus Naikuni** of cash Kshs 4,000/- one beaded belt, and one wallet valued at Ksh.5,000/- and at or immediately before, or immediately after the time of such robbery used actual violence on the said **Dr. Titus Naikuni**.

At the trial, the prosecution called fourteen witnesses whereas the appellant made an unsworn statement in defence.

PW1 – **John Pendo Laitan** testified that he worked as a security guard at Whistling Thorns Club. On 24th October, 2009, he had reported to work at 1700 hours. At 1830 hours five people came to the hotel.

They wore long coats and had knives and a gun. As he walked towards the gate, the four men caught him. They took his radio call, knife and phone. They then took him to the hotel which was about 80 meters away. It was not very dark and some of the men donned masks and others had hats. They demanded to know where the door was and they were shown by one, Joseph. They all entered the bar and customers were ordered to lie down. There were six men and the owner of the hotel and they were all told to lie down on the verandah. These men searched the hotel and robbed the patrons. He lost his phone, knife and radio.

As they collected the stolen items, the three men said "Njoroge take the things we go." The assailants beat up the patrons. PW1 was hit with an axe on the shoulder and knee. He does not know who hit him as he was lying down. They were then instructed to get inside the office and thereupon heard a gunshot. The thugs were inside. Police later came with the accused who had a camera on his neck. He was the one who collected things for the thugs. PW1 was later treated and issued with a P3 Form which was duly filled. He went to the police station and was able to recognize the accused person. He had never seen the accused before but the incident took a long time in a lighted premises.

On cross-examination, PW1 reiterated and confirmed his evidence as adduced.

PW2, **Joseph Moyiayi**, duly sworn testified that he was a cook at Whistling Thorns. On 24th October, 2009, he was on duty at about 1700 hours. At 1840 hours he saw the guard with four people all of whom he could see clearly as his window faced the gate. He testified that he alerted Irene and the men ordered them to open the door leading to the bar. He suggested they use the back door. They all did go there except one man who remained with them. He testified that he recalled that this was the man who had come there earlier. He later joined the others. A colleague later informed PW2 that Titus Naikuni was being forced into an office and on peeping and confirming the same he reported it to the manager. He thereafter went and hid in a neighbouring school. He later heard gun shots and came back after a while only to find the accused lying down in the restaurant. He recognized him as the man he had seen earlier and had had a conversation with. He later attended an identification parade and identified the appellant. This was again reiterated and reinforced at cross-examination and re-examination.

PW3, **Sarah Njeri** duly sworn, testified that she was a waitress at whistling Thorns Hotel. On 24th October, 2009, she was passing through the kitchen door when someone told her to join the other patrons who were lying down in the restaurant. These were three customers and one employee lying down. The robbers started hitting the guard and demanded that he shows them where the money was kept. They also asked how much had been collected. They hit her with a torch. One of them had a gun.

The robbers saw a handbag and demanded car keys from Mr. Naikuni. They hit him with a belt and a butcher's knife. They knocked his colleague also. I had them calling the names of Peter, Ngagu and Njoroge. They forced Mrs. Mike to take them round the hotel as they harassed patrons and ransacked the cash till. They demanded to be taken to the pool table and broke the staff box.

At the close of the prosecution case, the appellant was brought to his defence. He gave an unsworn statement and called the DW2, one, **Patrick Mwangi Kimani** who gave a sworn statement in defence. The court found him guilty and sentenced him to suffer death as per the law. The appellant has now appealed both against the conviction and the sentence. In his undated petition of appeal the appellant raises the following grounds of appeal;

1. *That, the learned trial magistrate erred in law and fact when he convicted me in this case which relying on the evidence of identification.*

2. *That, the learned trial magistrate erred in law and fact when he convicted me in this case while relying on contradiction evidence from the prosecution side.*

3. *That, the learned trial magistrate erred in law and fact when he convicted me in this case while relying on the exhibits which were inside the bag without him considering that the same was not recovered on my possession.*

4. *That, the learned trial magistrate erred in law and fact when he convicted me in this case while rejecting my defence without good reason thus violating the law provision under sect, 169 (1) of CPC.*

5. *That, My lords, I can't recall the whole evidence that was adduced during the trial now beg leave to this Honourable court of justice to furnish me with trial proceedings so that they may assist me to add more cogent grounds during the hearing of this appeal and same. I pray to be present during the hearing date.*

He also brings out supplementary grounds of appeal as follows;-

1. ***That**, the learned Trial Magistrate erred in law and fact by convicting and sentencing me on a defective charge sheet.*

2. ***That,** the learned Trial Magistrate erred in law and fact by failing to observe that the circumstances of identification were hectic, brutal and chaotic barely to allow a positive identification.*

3. ***That,** the learned Trial Magistrate erred in law and fact by failing to re-evaluate the entire record as the law requires and observe that the key witnesses were not credible contrary to section 163(1)(c) of Evidence Act.*

4. ***That,** the learned Trial Magistrate erred in law and fact by convicting me on the alleged doctrine of recent possession of goods and circumstantial evidence which did not meet the required standards.*

5. ***That**, the learned Trial Magistrate erred in law and fact by failing to observe that the alleged mode of arrest, search and possession were not lawfully proved*

6. ***That,** the learned Trial Magistrate erred in law and fact by failing to observe that the ownerships of the alleged (items) were not positively identified.*

7. ***That**, the learned Trial Magistrate erred in law by failing to adequately consider my unsworn defense and further contravened Sec. 169 (1) of the CPS.*

When this appeal came for hearing on 16th October, 2013, the appellant was in person whereas the state was represented by Ms Ikal. The appellant submitted that he had filed written submissions and wished to rely on them entirely. He did not have anything to say.

Counsel for the state opposed the appeal and supported the conviction and sentence. This, she submitted, is based on the fact that the appellant was positively identified by PW1 amongst other people. He was identified as the person who was collecting items from people who were lying down – page 14 line 19-20 of the proceedings and judgement. The time of such identification was 1830 hours and it was not dark and therefore the case and certainty of identification.

Again, the incidence took a longtime and he was able to positively identify the appellant – page 15 line 15 of the proceedings. PW1 also confirmed that the appellant was being referred to as Njoroge. Items stolen from PW1 and others lay in a bag besides the appellant in the hotel on his arrest. He also identified him at an identification parade.

PW2 on the other hand corroborates the fact that he had seen the appellant and waved him at 1830 hours. They had a small conversation. He identified him – page 10 line 16. He had seen him three times on that day and that when the accused was arrested he had a camera belonging to the hotel. PW2 identified the appellant as one of the robbers who frisked people. PW3 corroborates the evidence that the place was well lit and identification was easy. PW4 corroborates the evidence of all the other witnesses when he testified that the appellant ordered them to lie down and he beat them.

The appellant, in support of the appeal cites inconsistency of evidence – page 21 line 22-23 in that the accused takes several roles on the scene. Again, 3 cameras were cited in the charge sheet. The fourth camera was a frame up. The charge sheet is defective and the defence evidence was completely sidelined. The appellant submits that the defence case was not considered by the trial court despite being mentioned. The charge sheet was defective and evidence of stolen computers was not listed on the charge sheet. He therefore prayed that the appeal be allowed.

We have considered the appellant's written submissions in support of this appeal. We also note that these submissions are annexed to the Supplementary Grounds of Appeal.

The submissions border on two areas. The first one merges grounds 1, 2, 3 and dwells on inconsistency in evidence. It is the appellant's submission that PW1 - a security guard testified that at around 1830 hours, five people came to the premises. Some had hats while others had masks. They beat them up and ordered them to lie down. PW1 testified that he did not recognize the robber who took his items and only heard robbers instructing a Mr. Njoroge to collect the items from customers. PW2 testified that he saw two people waving at him. At 1840 hours he saw the guard with four people. He identified the appellant as one of the people who had come there earlier. On learning that they were robbers, he ran away to a neighbouring school and informed a Mr. Mutinda, the manager. He never saw the appellant with any weapon. The appellant therefore cites this inconsistency in evidence as a valid ground of appeal.

The appellant has cited authorities to buttress his submissions. These are **Joseph Lebo vs. Rep, Cr.App. No. 204 of 1987** where it was held that;

> *"….it is possible for a witness to believe genuinely that he had been attacked by someone he knew very well and yet still be mistaken so the possibilities of error or mistake therefore be a case of recognition or identification is there……"*

and **Republic vs. O. Akwel (1978) WLR 32**, where it was held that;

> *"……a conviction cannot stand for example where the identification witness had only a fleeting glance at the suspect……"*

The appellant further faults his conviction by the trial magistrate on the alleged doctrine recent possession of goods and circumstantial evidence which did not meet the required standards. On this the trial court held as follows;

> *"……he collected the items from the patrons he also assaulted some of the patrons and held conversation with those who were in the kitchen, his defence that he was also a victim of the robbery is therefore not tenable in this circumstances. PW11 Corporal Otieno in his evidence stated that when the police arrived at the scene they saw 4 men ran different directions he concentrated on the accused person and arrested him. At the accused had a bag which contained items that were positively identified by the victims of the robbery. His evidence was corroborated by pw12 Inspector Ouma who helped subdue the accused as he was resisting arrest. Both witnesses stated that the time they arrested the accused he had been carrying the bag containing property of the complainants before dropping it across the fence. However at the time of his second escape he was still found in possession of an Olympus camera belonging to one of the complainants in this case……"*

The appellant also cites inconsistency in the evidence of PW12 on the items stolen and particularly faults the evidence of the number of cameras found on him. He submits that some of the items produced in evidence were not found in his possession and therefore the default on the reliance of the doctrine of recent possession. He cited the case of **Isaac Nanga Kahinga Alias Peter Ng'ang'a Kahinga vs. Rep Criminal Appeal No. 272 of 2005** (unreported), the court held;

> *"…...it is trite law that before a court of law can rely on the doctrine of recent possession as a basis of conviction in criminal case the possession must be positively proved. In other words,*

there must be positive proof, first the property was found with the suspect and secondary that, the property is positively the property of the complainant, thirdly that the property was recently stolen from the complainant. The proof as to time has been stated over and over again, will depend on the easiness with which the stolen properties can move from one person to another. In order to prove possession, there must be acceptable evidence as to search of suspect and recovery alleged stolen property, and in our view any discredited evidence on the same cannot suffice no matter how many witnesses……."

As a first appellate court, we are under duty to reconsider and evaluate the evidence afresh with a view to reaching our own conclusions in the matter. This duty has been stated and restated in many decisions both by the high court and Court of Appeal See **Pandya vs- R[1958] EA 336** and **Okeno –vs- Republic [1972] EA 32.** See also **Mwangi –vs- Republic [2004] 2 KLR 28** where the court held that "an appellant on a fist appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to have the appellate court's own decision on the evidence."

Having considered the record and the respective submissions of the parties, and bearing in mind our duty as a first appellate court, we consider that this appeal must turn on the issue whether or not the evidence of recognition upon which the appellant was convicted was free from error. Indeed most of the grounds of appeal and the appellant's submissions revolve around this one issue.

In the present appeal however, we find from our independent analysis of the evidence that the possibility of error in identifying the appellant was minimal. The appellant had been to the premises again before this incident and at all this time encountered PW2 who was now familiar. He had even had a chat with him earlier. At the time of the attack, four people, including the appellant had taken control and captured PW1 who showed them around. There is also the mention of the name *Njoroge* in instructions to him to collect the items from the subdued patrons and others who had been forced to lie down by the assailants.

Further, the incident occurred at 1830 hours when there was enough light to identify a person and also that the robbery took place in well-lit premises. There is evidence that the stolen items were recovered from the appellant and more so the camera belonging to the hotel. PW6 identifies the appellant as one of the robbers while PW8 testified that the other robbers referred to him as Njoroge. This evidence is overwhelmingly in support of the prosecution case and dents the appeal.

PW12, Inspector Ouma, a police officer who rushed to the scene of robbery on report testified that he assisted in subduing the appellant who was resisting arrest. The appellant was also fleeing from the scene and was arrested carrying a bag containing the property of the complainants before dropping it across the fence. At the time of his second escape, he was still found in possession of an Olympus camera belonging to one of the complainants in the case. This is besides the evidence of PW1 – the arresting officer, CIP Otieno and PW5 - Titus Ntokeo Naikuni who identified the appellants from their exposure to him during the incidence. This is a clear case of identification and recent possession.

The appellant also complains that the trial court convicted him without a consideration of his defence. The record indicates that the appellant and DW2 respectively gave an unsworn and sworn statements in defence. The appellant in his testimony narrated how he had gone to the club on invitation by a client who wished that he would fix his computer. The customer/client bought him drinks as he fixed the computer. The raid now occurred and there was gunfire. He in his drunken stupor struggled to rush out and in the process people started accusing him of the robbery. He was incriminated with possession of a bag containing items involved in the robbery. He was arrested and later charged with this offence.

DW2 testified that he is a trader at Marikiti Market. He knew the accused whom he had used to fix a computer for his children. He testified that on 24th October, 2010 he had called the accused to do his computer at Whistling Thorns Club. He did and DW2 bought him drinks. They parted only for him to be told that he had been arrested later.

The trial court considered the evidence of DW2 in the judgement. It would appear that it did not attach a lot of value on this and sidelined the same. We consider the defence evidence as mere denial and

fabricated to suit the circumstances of a defence. It is not of compelling probative value and therefore the trial court's treatment of the same. The argument by the appellant that this was not considered is negated by the trial court's elaborate analysis of the entire prosecution evidence leading to conviction and sentence. We find this ground of appeal as not sustainable.

We therefore agree with the respondent that the prosecution case was proved at trial. We dismiss the appeal and uphold the conviction and sentence.

Delivered, dated and signed the 27th day of June, 2014.

R. LAGAT-KORIR **D.K.NJAGI MARETE**

JUDGE **JUDGE**

In the presence of:

……: Court Clerk

……: Appellant

……: For the Appellant

……: For the State/respondent