REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL Nos. 698 & 699 OF 2010

VINCENT ADOLLO EBOSO…...……..1ST APPELLANT

JOSEPH MACHARIA MUTHEE…….....…….....2ND APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(From original conviction and sentence in criminal case Number 3999 of 2008 in the Chief Magistrate's Court at Kibera – Mr. Onyango (SRM) on 12th August 2010)

JUDGMENT

Vincent Adallo Eboso and Joseph Macharia Muthee were charged together with the offence of robbery with violence contrary to section 296(2) of the Penal Code. In the alternative, they were charged with handling stolen goods contrary to section 322(1) of the Penal Code. It was alleged that on the night of the 15th December 2008 at Ngong area Kajiado District within Rift Valley Province, jointly with another not before the court, robbed Wilfred Nanjero Obando a Nokia mobile phone make C 168, a Sony T.V 21 inches, a sony video computer monitor, a CPU speaker, a computer mouse, a kitchen knife, a duvet and a duvet cover, cash Kshs. 700/= and other assorted household items valued at Kshs.72,500/= and at or immediately before or immediately after the time of such robbery used actual violence to the said Wilfred Nanjero Obando.

In the alternative charge the particulars of the offence were that, on the night of the 15th December 2008 at Ngong area Kajiado District within Rift Valley Province otherwise than in the course of stealing, dishonestly retained a Sony TV 21 inches, a Sony video, a computer monitor, a CPU speaker, a computer mouse, a kitchen knife, a duvet and a duvet cover knowing or having reason to believe them to be stolen goods.

At the close of the trial, they were both convicted of robbery with violence and sentenced to suffer death. The two appellants' appeals were consolidated and cited as appeal number 698 of 2010. The appellants relied on their written submissions which they filed in court respectively. Miss Njuguna the learned state counsel opposed the appeal on behalf of the respondent.

The summary of the appellants' three grounds of appeal as amended was that their identification was flawed as the circumstances at the alleged scene of crime did not favour a positive identification. Secondly that no exhibits were discovered on the appellant causing them to suffer prejudice and thirdly that crucial witnesses failed to testify.

The prosecution evidence against the two men was that PW1 was at her house in Ngong on 15th February 2008 at about 7 p.m. watching over PW2's house who had travelled to Eldoret. PW2's house help used to come regularly during the day and discharge her duties as usual in PW2's absence. On the said date at 7 p.m., she came accompanied by three men with whom they forcefully entered the home and attacked PW1. They knocked him down and tied his hands before they took away his mobile phone, make Motorola C168 worth Kshs. 4,500/= and cash Kshs. 700/=. They then locked him in the toilet. His screams alerted members of the public who came to his rescue demanding that the robbers open the house. They then forced their way into the house where they found and arrested two men and the maid while the other assailant managed to escape. They were taken to Ngong police station where they recorded statements. PW1 was able to identify the accused persons as there was electricity light in the house. He was also able to identify the items they were intending to steal which included a T.V set computer and CPU that had been tied up using a sheet, a video cassette recorder Sony, 2 computer speakers, computer monitor, one bedcover, 2 bed sheets, a duvet cover and a knife.

The 1st appellant argued that no specific description was given to the police regarding his identity. There was no evidence regarding the intensity of light, distance and PW1's position from the alleged appellant at the material time. The 2nd appellant on the other hand urged that PW1 was not in control of his faculties at the time and couldn't possibly have identified strangers as he was under siege from the narration of his evidence. He also pointed out to the prosecution witnesses' failure to tender evidence on the light in the house, distance and description of the room, position of the light in relation to the door and the position of the alleged attack as very vital ingredients that were omitted. All these according to them rendered the identification evidence untenable.

We have looked at the record and noted that although he did not testify on the intensity of light, PW1 however testified that there indeed was electricity light in the house that helped him identify the assailants. He described seeing the 1st appellant properly on that night as he remained with him in the bathroom when the members of the public responded before he jumped over the ceiling. PW1 also testified that he saw the 2nd appellant clearly as there was light. He however did not give any description.

In **R. V. Bentley** [1991] CLR 620, the English Court of Appeal commented that:-

"A recognition which was the type of identification evidence here, could not be regarded as trouble free because many people had experienced seeing someone on the street that they knew and later discovered that they were wrong."

Such evidence would require a degree of scrutiny of the court and would entail consideration of factors such as:-

a. the length of time the witness had the suspect under observation,
b. the distance between the witness and the suspect,
c. the lighting condition,
d. how long the witness has known the suspect.

In the instant case, PW1 was categorical that he saw the appellants on the date of the robbery even though he gave very scanty description. He insisted that the scene of the robbery was well-lit with electricity light from the house.

On her part, the trial magistrate while remarking on the issue of identification made the following observation.

"***PW1 identified him (1st appellant) at that time by appearance and later when the members of the public arrested accused 1 he again identified him as one of the people who robbed him. PW1 also identified accused 2 when he was arrested by the members of the public***"

In view of the above, we concur that not much description is given by PW1. However, one could argue

that the identification evidence is buttressed by the fact that the appellants were arrested by members of the public at the scene of crime who had ample time to identify them.

In the case of ***KIILU & ANOTHER –V- REPUBLIC [2005] KLR 174)*** the Court of Appeal stated this on the evidence of a single witness;

"Subject to certain well known exceptions, it is trite law that a fact may be proved by testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult."

The above remarks lead us to inquire what would amount to other evidence whether circumstantial or direct that would favour positive identification?

The evidence of PW4 regarding the arrest of the 1st appellant as he scaled down the ladder would seem to corroborate that of PW1 who testified in cross examination by the 1st appellant that he saw him actually jump over the ceiling. Immediately after their arrest, he was able to fortify his identification of the appellants at the scene of crime. This evidence would lend credence to the identification evidence by PW1. The 2nd appellant on the other hand was found lying under a bed in the complainants' house.

The appellants in their defenses offer little other than mere denials and the fact that they were per chance either in the vicinity or passersby who were arrested by the police without cause. On the exhibits, the record indicates that the same were produced in court. PW1 and PW2 identified in court the recovered items that were tied in a sheet by the appellants as the T.V set, computer, DVD, duvet sheet and knife all valued at Kshs. 72,500/=, while PW4 also saw the items wrapped in a sheet when they responded to the alarm that had been raised and unwrapped them. We note that the appellants did not raise any issue with them during cross examination and in their defenses.

It is true that the house maid who entered the house with assailants should have been called to testify. However, her evidence would have been accomplice evidence which could not add any value to the prosecution case. The failure to call her did not therefore prejudice the appellants in any way. We say so because the 1st appellants arrest as he scaled down the ladder placed him at the scene of the robbery. This was soon after he had escaped the complainants' house through the ceiling.

The 2nd appellant as we have observed was found lying under the bed in the house. This was incriminating and cannot escape the conclusion that he was one of the robbers. On entering the house the assailants covered the complainant's mouth with pieces of clothes and tied him using a rope. He could therefore not talk.

The 2nd appellant threatened him with a knife which he had picked in the house and ordered him not to make any noise. The assailants were four in number including the house maid and the man who escaped. The ingredients of Section 296 (2) of the Penal Code were met. The offence was proved against both appellants

beyond any reasonable doubt. Accordingly we uphold the conviction and sentence and order that these appeals are dismissed.

SIGNED DATED and **DELIVERED** in court this **17th** Day of June **2014**.

A.MBOGHOLI MSAGHA L.A. ACHODE

JUDGE JUDGE