



**IN THE HIGH COURT AT MIGORI**

**CRIMINAL APPEAL NO. 21 OF 2014**

**(FORMERLY KISII HCCRA NO. 122 OF 2013)**

**BETWEEN**

**JULIAS CHACHA MASIA .....APPELLANT**

**AND**

**REPUBLIC .....RESPONDENT**

*(Being an appeal from the original conviction and sentence in Criminal Case No. 512 of 2012 at Senior Resident Magistrate's Court at Kehancha, Hon. C. M. Kamau, Ag SRM dated on 31<sup>st</sup> October 2013)*

**JUDGMENT**

1. This is an appeal lodged by **JULIUS CHACHA MASIA** who was convicted of the offence of shop breaking and committing a felony contrary to **section 306(a)(b)** of the **Penal Code (Chapter 63 of the Laws of Kenya)**. He was charged with one Samson Chacha Mwitwa alias *Kipepeo* who was acquitted. The particulars were that between the night of 4<sup>th</sup> and 5<sup>th</sup> October 2012 at unknown time at Isebania Township in Kuria West District within Migori County with others not before the Court broke and entered into a building namely a shop of OA and stole therein Kshs.951,700/00 and Tshs.28,500,000/00.
2. The prosecution called 6 witnesses to prove its case. PW 1, the complainant, testified that on the night of 4<sup>th</sup> and 5<sup>th</sup> October 2012, he had locked the shop. The next morning he was informed by the watchman, PW 2, that two people, one called *Tall*, the appellant, and *Kipepeo* had been hovering around the shop. He confirmed that the shop had been broken into through the roof and safes broken and cash stolen. He reported the matter to the police.
3. PW 1 further testified that he knew *Kipepeo* as he had broken into his shop earlier and stolen money which he promised to repay. *Kipepeo* was tracked down by *Sungu Sungu*, a vigilante group and in the process he blamed *Tall* for the crime. *Kipepeo* was questioned at a community policy meeting where he implicated *Tall*. PW 1 further testified that he knew *Tall* as he used to operate a small kiosk to his shop where he used to change money. He stated that *Tall* had disappeared from the area after the break in and thereafter the area was calm but when he returned to the area, nine shops had been broken into.
4. PW 2, was the night guard employed to guard shops including that of PW 1. PW 2 also testified that on 4<sup>th</sup> October 2012 when he reported to work at about 9.00pm he was greeted by *Tall*, whom

- he knew as a money changer, dressed in a black trench coat. Later at 1.00 am, as he was on patrol in the back street, he saw *Tall* again still dressed the trench coat. He testified that *Tall* walked away, went to another building and changed his clothes and came back dressed in a normal shirt and neck cap. *Tall* talked to him and told him that money was scarce. He thereafter went in front of PW 1's shop where he started making calls. He never saw *Tall* again. PW 2 stated that at about 2.00 pm he met PW 3 who told him that he had met two men; one tall and the other of average height and one of them had a ladder which he dropped.
5. PW 3, the son of PW 1, confirmed that he locked up the shop the previous day and headed home. When he went to re-open the shop on the next day, his father was already there. He observed that the shop had been broken into, the safes broken and money stolen. In cross-examination, he confirmed that he knew *Tall*.
  6. PW 4 was a night watchman providing security to the shops in the area. He recalled that he was on duty on the night of 4<sup>th</sup> and 5<sup>th</sup> October 2012. At about 9.00 pm, he went on patrol on an alley way between the shops which was used by hawkers and other business people to store their wares, he saw a young man coming from the alley. He also noticed a ladder pushed against the wall. He called his fellow watchman and they took the ladder. He stated that he saw a tall person wearing a black coat and kofia but did not see his face. He testified that although he did not know the appellant, the person he saw was as tall as the appellant.
  7. PW 5, the chairperson of the community policing in Isebania Town, testified that he was requested by the Chief to assist in locating *Tall* and *Kipepeo*. He stated that community members arrested *Tall* whom he knew. PW 6, the investigating officer, investigated the matter. He visited the shop and confirmed that it had been broken into and the safes broken into and emptied of their contents. He also interviewed the two watchmen and the other witnesses. He caused the accused to be charged.
  8. The appellant was placed on his defence and elected to give a sworn statement. He admitted that he was a money changer and hawker. He denied knowledge of the offence that took place months after before he was arrested. He stated that he was arrested on 2<sup>nd</sup> February 2012 for allegedly doing business in a customs area which is prohibited.
  9. The learned Magistrate concluded that the appellant's presence at the scene was suspicious and several facts pointed to the appellant as the person who must have broken into the shop. First, that the appellant changed his clothes at 1.00 am and then hovered around the shop which was broken into. Second, a person wearing a coat identical to one he changed out of and fitting his physical description was seen leaving a ladder to an alley adjacent to the building that was broken into. Third, the description of the appellant given by PW 4, who did know the appellant, together with the testimony of PW 2 led to the inescapable conclusion that it was the appellant who committed the offence. The learned Magistrate also relied on the evidence PW 6 that the appellant had disappeared from Isebania after the incident to support the inference of guilt.
  10. The appellant contests the conviction particularly on the ground that he was not identified as the person who committed the offence and that there was nothing to connect him to the offence. Ms Owenga, the learned Counsel for the State, supported the conviction on the ground that there was sufficient evidence to connect the appellant to the offence and although it was circumstantial, PW2 and PW4 gave evidence that implicated the appellant.
  11. As this is a first appeal, this Court is obliged to consider the evidence a fresh, evaluate it and reach an independent determination bearing in mind that it neither saw nor heard the witness (see ***Okeno v Republic* [1972] EA 32**).
  12. The prosecution case was based on circumstantial evidence as no one saw the appellant break into the complainant's shop. The principle applicable in such case was discussed by the Court of Appeal in ***Nzivo v Republic* [2005] 1 KLR 699** where it stated that, "*In a case dependent on*

*circumstantial evidence in order to justify the inference of guilt to the incriminating facts must be incompatible with the innocence of the accused or the guilt of any other person and incapable of explanation upon any other reasonable hypothesis than that of his guilt. It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other coexisting circumstances which would weaken or destroy the inference."*

13. I have scrutinized the evidence, and I find that principle evidence identifying the appellant in the area was that of PW2. While there was suspicion that he would have been the person seen in the vicinity. It is also possible that the facts presented could be interpreted in the appellant's favour. There is evidence that appellant was a money changer. PW 2 testified that at 2.00 am boda boda people were still operating. It is possible that he was still carrying on business as Isebania is a border town. Moreover, he was not a stranger in the area as he operated within the vicinity. His appearance in the area could not be termed as strange or suspicious.
14. The evidence of PW 6 that the appellant disappeared from the area for five months was indicative of guilty is likewise not sufficient to support a conviction. No evidence was led to show that the appellant was away from the area for any other reason other than as a result of guilt. The investigating officer, PW 6, did not make an effort to look for him immediately after the offence was committed. In ***Sawe v Republic [2003] KLR 364*** the Court held that, "*Suspicion however strong cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt.*"
15. The guilt or otherwise of the appellant turns on the issue of identity. In ***Paul Etole & Another v Republic, Criminal Appeal No. 24 of 2000***, the Court of Appeal gave the following exhortation, "*The prosecution case against the second appellant was presented as one of recognition or visual identification. The appeal of the second appellant raises problems relating to evidence and visual identification. Such evidence can bring about miscarriages of justice. But such miscarriages of justice occurring can be much reduced if whenever the case against an accused depends wholly or substantially on the correctness of one or more identification of the accused, the court should warn itself of the special need for caution before convicting the accused. Secondly, it ought to examine closely the circumstances in which the identification by each witness came to be made. Finally, it should remind itself of any specific weaknesses which had appeared in the identification evidence. It is true that recognition may be more reliable than identification of a stranger; but, even when the witness is purporting to recognize someone whom he knows, the court should remind itself that mistakes in recognition of close relatives and friends are sometimes made.*"
16. The evidence against appellant was that PW 2 recognised him when they met in the area where the theft took place. That alone does not implicate him in the theft. PW 4 saw a person he described as tall. He did not know the appellant but nevertheless gave a description that the learned magistrate concluded was that of the appellant. PW 4 did not give evidence as to the conditions of lighting, a detailed description of the clothes that would lead to the conclusion that the person was one and the same and height of the person. The terms "*black coat and kofia*" and the term "*tall*" are too general in nature and could refer to anyone. This was a case where an identity parade would have been suitable. The evidence, in my view, was insufficient to implicate the appellant in the offence.
17. The appeal is allowed. The conviction and sentence is quashed and the appellant is set free unless otherwise lawfully held.

**DATED and DELIVERED at MIGORI this 23<sup>rd</sup> day of September 2014**

**D.S. MAJANJA**

**JUDGE**

Appellant in person.

Ms Owenga, Principal Prosecuting Counsel, instructed by the Director of Public Prosecutions for the respondent.