



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**

**CRIMINAL APPEAL NO. 311 OF 2010**

**LUSHUSHU ABUTO.....APPELLANT**

**versus**

**REPUBLIC .....RESPONDENT**

**CONSOLIDATED WITH**

**CRIMINAL APPEAL NO. 306 OF 2010**

**FRANCIS LUKIONI KOLEN.....APPELLANT**

**versus**

**REPUBLIC .....RESPONDENT**

*(arising from the judgment of Hon. H.N. Ndungu Senior Principal*

*Magistrate Nanyuki in Criminal Case No. 109 of 2010)*

**JUDGMENT**

1. The Appellants herein LUSHUSHU ABUTO and FRANCIS LUKIONI KOLEN were charged with the offence of robbery with violence contrary to section 296(2) of the Penal Code the particulars of which were that on 5th March 2009 at Kambi Karatasi village in Laikipia East District within Rift Valley Province jointly with others not before the court while armed with dangerous weapons namely a rifle robbed JANE BORU HALAKE , one radio, make Sony, one pair of bed sheets, five scratch cards, and Ksh. 1000/- all valued at Ksh. 5900/-and at or immediately before or immediately after the time of such robbery used actual violence to the said JANE BORU HALAKE.

2. The second appellant FRANCIS LUKIONI KOLEN faced an alternative charge of handling stolen goods contrary to section 322 (2) of the Penal code the particulars of which was that on 6th day of March 2009 at Ngare Ngiro trading centre in Laikipia East District within Rift Valley Province otherwise than in the course of stealing dishonestly received or retained one radio, make Sony, valued at Ksh. 4500 knowing or having reasons to believe it to be stolen good.

3. They were tried, convicted and sentenced to death. Being aggrieved by both filed individual appeals which appeal at the time of hearing herein we consolidated.

4. When the appeals came up for hearing before us, the appellants who were not represented each filed an amended grounds of appeal and written submission which were identical in nature while Mr. Cheboi

appeared for the state.

5. In the amended grounds of appeal the appellants raised the following grounds:

**a. *The appellants were not properly identified or recognized.***

**b. *The trial magistrate failed to reevaluate the whole prosecution evidence before reaching her verdict.***

**c. *The appellants defences were dismissed without giving cogent reason for the same.***

6. It was submitted by the 1st appellant that the source of light which was described as a tin lamp was not credible enough to recognize the attackers and in support of the submission case of MAITANTI V R 1988 2KAR 77 was submitting. It was further submitted that the identification parade conducted by P.W.4 Shadrack Naroa was not credible as per the forces standing order Cap 46. It was submitted that section 169 of CPC as regards the appellants defence was not complied with.

7. For the 2nd appellant it was submitted that the prosecution case was full of contradictions. It was submitted that there was no any tangible evidence to support the doctrine of recent possession since there was no inventory filed by the police officers to ascertain the recovery and no receipt was produced to confirm ownership.

8. Mr. Cheboi for the state opposed the appeal and submitted in support of recent possession that according to P.W.1 on 5th March 2009 at 2.30 pm the appellant together with a third man not before court robbed her of the items stated in the charge sheet. P.W.1 was able to identify the radio and produced receipt for the same. This evidence was corroborated by the evidence of P.W.2 and that the trial court found that the evidence of identification parade was sufficient. It was further submitted that the trial court considered the appellants defence and found that it could not displace the prosecution case.

9. This being a first appeal we are in law required to reassess the evidence tendered before the trial court and to come to our own conclusion though alive to the fact that we did not have the advantage of seeing and hearing the witnesses.

10. It was the prosecutions case that on 5th March 2009 P.W.1 JANE BOLU HALAKE at 8.30 pm. heard a knock on her door and the 2nd appellant together with someone who was not before the court asked for water for himself and the other person who was outside which she gave. The second appellant was known to her having stayed in her house for three days. While standing on the door way of her house the second appellant shouted to her to lie down she was pushed into her bed room together with her children. The 1st appellant was all this time in the sitting room while the 2nd appellant was in the bedroom door and was robbed of the items in the charge sheet.

11. P.W.2 MARY NGITE a minor aged 14 years testified that she saw three men including the 1st appellant whom she had seen before. She confirmed under cross examination that the first appellant had been in the house before for three days and two days later came with the group that robbed them. P.W.3 MARGARET LINGA SHEMELE's evidence was that she went with the 1st appellant to her house so as to make for him tea but he left telling her that he was picking something only to return with the complainant's radio. She then saw the police come to her home and arrested the appellant.

12. P.W.4 SHADRACK NAROA's evidence was that he conducted identification parade in respect of the 2nd appellant where the same was picked who thereafter thumb printed the identification parade form.

13. When put on their defence the 1st appellant gave unsworn evidence and stated that on 6th March 2009 he was at Rumuruti selling milk when at 10 am he met four men at Matigei centre who arrested him and stated that it was never clarified from whose house the radio was recovered.

14. The 2nd appellant also gave unsworn evidence and stated that he was arrested at 11.00 am from the

herds field and that when a parade was conducted the witness could not pick him out.

15. In convicting the appellants the trial court had this to say:

***“Accordingly there is no doubt as to the identify of accused 1 in this matter. Both P.W.1 and P.W.2 told the court they knew him he had sought hospitality in their home for some three days and P.W.1 had accommodated him because allegedly he was from their clan. The little girl P.W.2 also confirm that allegation on the night of the robbery. P.W.1 also heard accused 1 speak outside. I believe she was familiar with his voice. He had leaved in her home some 3 days and to strengthen her case the 1 accused was arrested in possession of very recently stolen goods the burden shifts to him to explain his possession in this case no attempt by the 1st accused to explain in possession yet he had the stolen radio just a few hours after the robbery. The court is in the circumstances entitled to conclude that indeed he was the robbery ”. emphasis added***

15. we have therefore identified the following issues for determination:

- a. Were the appellants positively identified.***
- b. did the prosecution prove their case against the appellants beyond any reasonable doubt.***
- c. Did the trial court shift the burden of proof upon the appellants.***

16. On the identification of the appellants P.W.1 stated that the second appellant who was aged entered in her house with another man and she had never seen them before. She had a tin lamp in the house. She knew the 1st appellant who was outside and she saw him and knew his voice and all the three men entered the house and put off the tin lamp. This evidence was contradicted by the evidence of P.W.2 MARY NGITE that she could identify the appellants from outside since there was moon light and that the first appellant entered the kitchen.

17. There was no evidence tendered by the prosecution to confirm how P.W.1 left the kitchen to the main house further there was no evidence by P.W.1 that the second appellant had asked her for tobacco. P.W.2 also contradicted the evidence of P.W.1 on who gave the appellants water. We therefore find that there was gaps in the prosecution case against the appellants and therefore their conviction was not safe.

18. It is trite law that in criminal case the burden of proof is always upon the prosecution and in shifting the said burden to the 1st appellant the same was prejudice. It is further not clear whether the 1st appellant was identified by voice recognition or physical recognition and the said benefit of doubt should have been given to the appellants.

19. We therefore find that the conviction of the appellants herein was not safe and for that reason allow the appeal on both conviction and sentence which we hereby quash and set aside. The appellants should be released forthwith unless otherwise lawfully held.

Dated, signed and delivered at Nyeri this 19th day of Septemebr 2014.

**J. WAKIAGA**

**JUDGE**

**J. NGAAH**

**JUDGE**

Court: Judgment is read in the open court in the presence of the appellant and Miss Maundu for the state.

**J. WAKIAGA**

**JUDGE**

**J. NGAAH**

**JUDGE**