REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL NO. 417, 420, 421 OF 2010

(Being an appeal from the judgment of Maralal Senior Resident Magistrate's Court Criminal Case No. 69 of 2009, A. K. Ithuku, SRM)

RICHARD LENGURO RAMACHA.....1ST APPELLANT

LONKIYIA LELIKAT.....2ND APPELLANT

JACOB LELEMEU.....3RD APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The Appellant herein was charged together with Lonkiyia Lelikat, Jacob Lelemeuwa and 2 others before the lower court in Maralal Senior Resident Magistrate's Court Criminal Case No. 69 of 2009 with 4 counts namely-

(I) Counts 1 and 2- robbery with violence contrary to 296(2) of the Penal Code - the particulars whereof were that on 26/03/2009, at Kisima Area along Kisima Suguta Marmar Road in Samburu Central District of Rift Valley Province, the accused persons together with others not before court and while armed with a G3 Rifle S/No. 77097794, AK 47 S/No. BA 0560-A7832 and Ceska Pistol S/No. A116789 robbed Gladys Njeri Kinyanjui of her mobile phone make 6280 , one pair of safari-boots, one t-shirt, 3 pairs of socks, three packets of mango juice, Kshs. 400/- and snacks all valued at Kshs. 25,000/= and Moses Nduyu Mwangi of his mobile phones make Samsung M620, Samsung x550 and charger, Nokia 1112, Nokia 2760, Nokia 6085 and at the time of the robbery threatened to use personal violence to the said Gladys Njeri Kinyanjui and Moses Nduyu Mwangi.

(2) Count 3-being in possession of a firearm without a firearm certificate contrary to section 89(1) of the Penal Code the particulars of which were that on 26/03/2009 at Lolmolok Sub-location Samburu Central District of Rift Valley Province the accused persons were found in possession of firearms make G3 Rifle S/No. 77097794, AK 47 S/No. BA 0560- A7832 and Ceska Pistol S/No. A116789 without a firearm certificate.

(3) Count 4-being in possession of ammunition contrary to section 89(1) of the Penal Code the particulars of which were that on 26/03/2009 at Lolmolok Sub-location Samburu Central District of Rift Valley Province the accused persons were found in possession of 17 rounds of 7.62mm ammunitions 4 rounds of 7.62mm special ammunition and 14 rounds of 9mm

ammunitions. They were also charged with an alternative count of handling stolen goods contrary to section 322(2) of the Penal Code.

2. In the course of the trial, the prosecution dropped the charges against the 4th accused person and the 5th accused person was shot dead while attempting to escape from custody.

3. The prosecution's case was that PW1, Moses Mwangi and PW2 Gladys Njeri Kinyanjui hired a matatu registration number KAW 663 R to transport some books and computers from Nairobi to Maralal. At around 3.00am, they reached a bridge near Kisima when PW1 saw a person cross the road. Suddenly, another person shot in the air. He saw the person that shot in the air as the headlights were on. The driver jumped out of the vehicle and it lost control. PW2 jumped onto the driver's seat and took control of the steering wheel but the vehicle hit a pillar moved on for a short distance and stopped. PW1, PW2 and the conductor were asked by 4 assailants to get out of the vehicle and lie down and they complied. They then frisked everybody and took their money. PW1 was robbed of Samsung M620, Samsung S550, Nokia 1112, Nokia 6085, Nokia 2760, a charger for X550 and some packets of mango juice. PW2 was robbed of her t-shirt, 3 pairs of socks, one pair of safari boots, a Nokia 6280 and some snacks. After the attack, the assailants left and the victims walked to Kisima. On their way, they met some Administration Police and informed them of the incident. These Police called officers from Maralal. The complainants were unable to identify their assailants and did not participate in an identification parade.

4. The following day 27/03/2009, PW1 and PW2 were summoned to Maralal Police Station and told some of their items had been recovered. PW1 testified that in one of his stolen phones exhibit 6, there were some photographs that had been taken of a beaded belt, a person holding 2 guns, a G3 gun, the 1st accused holding 2 guns, the 3rd accused and some men in masks.

5. PW3, the Councilor of Suguta Marmar Ward testified that on 26/03/2009, he was summoned to the DC'S office and informed that some robbers had been tracked to his area in Lolmorok. He was directed to accompany the officers to Lolmorok. Upon reaching the manyatta, they saw the 1st accused running away, chased after him and took him back to the house. They recovered some guns, an AK 47, G3 and a pistol. PW3 testified that the G3 gun S/No. 77097794 was his, that he had been given the same by the Government, that he had given the same to his nephew Lontis the previous day and Lontis had told him that it had been stolen. PW3 had not reported his gun as stolen.

6. PW5 testified that sometimes in March, he had seen the 2nd accused entering into the house of Lontis where he emerged with a G3 rifle. The 2nd Accused had said that he was going to look for lost animals and needed the rifle. PW3 was later charged with the offence of negligence and fined.

7. PW4 No. 219995 Ag SP William Kiptum testified that on 26/03/2009 at around 3.40 am he received a phone call from the OCS Maralal CIP Okongo and was informed that a vehicle had been attacked at Kisima. He mobilized his team and went to the scene of the robbery. There they found some officers from Kisima AP Patrol Base. At the scene, PW4 was able to pick out 4 different sets of footprints. They tried tracing the suspects using the Police dogs but the scent was lost after 5 kilometers. PW4 already had 2 suspects after having been tipped off by some informants that the 2 had been involved in a series of robberies. One of them was the Councilor's son and the other was the 1st Appellant. He called the DC who summoned PW3 to give them more information on the suspects. PW3 told them that he did not know of the whereabouts of his son but agreed to lead them to the 1st Appellant's house.

8. PW3, PW4, PW6 and other officers went to the 1st Appellant's house in Lolmorok where they found a manyatta with 3 houses. The 1st Appellant dashed out of his house on seeing the Police and was followed by some two young men. PW4 was able to identify the 2nd Appellant by his face and Samburu braids. The 3rd Appellant was found by PW6 hiding under the bed in the 1st Appellant's house. PW6 searched the house and recovered assorted mobile phones, a Mobile Charger, a t-shirt and safari-boots *(exhibits 2,3,4,5,6,7,20 and 21)* which PW1 and PW2 were able to identify as their property which they had reported as stolen earlier. They also recovered a G3 Riffle No, 77097794 which had been issued to PW3 by the Government and it had 17 rounds, an AK 47 which had 3 rounds and a Ceska pistol which had 14 rounds. The Rifles and rounds were taken to a ballistic expert. The ballistic report (exhibit 30)

shows that on examination, they were found to be firearm and ammunitions under the Firearms and Ammunitions Act. In the house, they found shoes that resembled the prints they had found at the scene, that is safari boots, black shoes and a plastic sandal. He then charged the 3 accused persons with the offences as per the charge sheet.

9. Upon considering the evidence, the trial magistrate found that the prosecution had established a prima facie case to warrant the Appellants be put on their defence. The 3 Appellants chose to give unsworn statements and did not call any witnesses. The first Appellant testified that on 26/03/2009 he was herding his livestock at Lolmolok near the road which leads to Maralal when he saw 3 vehicles heading towards Maralal. When they reached near him they stopped and one person pointed at him. The police got out of the car, shot in the air and arrested him. He was not informed of the reasons for his arrest and was taken to Maralal Police Station. He had a long outstanding grudge with PW3 and that is why he had framed him. DCIO Kiptum ordered them to take the guns and the officers took the photographs. He denied all the charges framed against him.

10. The 2nd Appellant said that he was arrested on 2/04/2009 and taken to Kisima Police Station, that he was taken together with the 1st Appellant to the forest and beaten by the Police, and that they were also given guns with no ammunition and their photographs taken by the Police. He also denied the charges.

11. The 3rd Appellant's testimony was that he was arrested on 26/03/2009 while he was on his way home from the shops and taken to Maralal Police Station and later charged as per the charge sheet. He also denied having committed the offences with which he had been charged.

12. In his judgment delivered on 8/12/2010, the trial magistrate identified the following issues for determination-

(1) whether there was a robbery as alleged,

(2) whether the accused persons were found in possession of firearms,

(3) whether the charges of handling stolen property were proved,

(4) whether the charges were proved beyond reasonable doubt.

13. He found that as the complainants did not identify the accused persons as the robbers, the evidence on robbery with violence was weak and could not be said to be beyond reasonable doubt. He therefore acquitted all accused persons on the 1st and 2nd counts. He however believed PW3, PW4 and PW6'S testimony that they had recovered a G3 Rifle S/No. 77097794, AK 47 Rifle S/No. BA0500 and a Ceska Pistol S/No. A116789S which upon being examined by a Ballistics Expert were respectively found to be firearms and ammunitions. He did not believe the Appellant's testimony that they were not in the 1st Appellant's house at the time or that they had been framed. He found that they had no lawful authority or permit to have the firearms and therefore convicted them of the 3rd and 4th counts. He also found it to be a fact that the appellants were found with phones, clothes and other items reported to be stolen in various robberies, and did not in their defences claim ownership over the said items. They knew that the items were stolen. He therefore convicted them of the alternative charge of handling stolen property.

14. Before sentencing, the prosecutor informed court that the 1st Appellant was at the time serving a sentence of 7 years for a conviction of handling stolen property in Maralal SMR Court Cr. 66/09, and that he had 2 previous convictions and had been sentenced to 8 years in Maralal SRM Court Cr. 196/05 and to 3 years for the offences of assault and attempted escape. The 2nd Appellant was at the time serving 8 years he had been sentenced in Maralal SRM Court Cr. Case 67/09 and a 7 years sentence in CR. Case 66/09. The 3rd Appellant only serving a sentence of 8 years in Maralal Srm Court Cr. Case 67/09 and 7 years in Maralal SRM Court Cr. Case 66/09. Upon considering the mitigation, the trial magistrate sentenced the Appellants to 10 years for the 3rd and 4th counts and 7 years for the alternative charge. The sentences were to run concurrently.

15. Aggrieved by both conviction and sentence, the Appellants filed separate appeals before this court. The 1st Appellant Richard Lenguro Ramacha filed Cr. Appeal No. 417 of 2010, the 2nd Appellant, Lonkiyia Lelikat filed Appeal No. 420 of 2010 and the 3rd Appellant Jacob Lelemeawa filed Appeal No. 421 of 2010. The grounds therein may be summarized as follows-

1. ***that none of the complainants was able to identify the Appellants.***
2. ***that the 2nd Appellant was arrested about 150 kilometers away from where the exhibits were recovered.***
3. ***that PW3 did not see the 2nd and 3rd Appellants on the date of the alleged arrest as they ran away.***
4. ***that the gun for which the 2nd Appellant was accused for handling belonged to PW3 and was never in the Appellants' possession.***
5. ***that the exhibits produced before court were not properly identified by the complainants as they did not produce receipts to prove ownership.***
6. ***that the exhibits were not recovered in the 3rd Appellant's house.***

16. Supplementary grounds of appeal were also filed on behalf of the Appellants by the firm of Kipkenei & Company Advocates in which they alleged that the trial magistrate erred in failing to order that the previous sentences were to run concurrently with the present. The State on its part opposed the appeals and in addition, filed a Cross Petition of Appeal dated 5th August 2011 against the judgment of the subordinate court on 2 grounds, namely-

(1) that the learned magistrate erred in law by acquitting the respondents of the charges of robbery with violence when there was overwhelming evidence to prove the said charges,

(2) that the learned trial magistrate erred in law by failing to appreciate the doctrine of recent possession which proved the charge of robbery with violence against the respondents.

17. It therefore urged this court to reverse the determination of the subordinate court and substitute it with a conviction of robbery with violence or that a re-trial be ordered. By its order made on 20/03/2013, the court directed that the 3 appeals be heard together in Criminal Appeal No. 417 of 2010. The parties made oral submissions before the court on 20/03/2013.

18. This being a first appeal, this court has the duty to re-appraise the evidence, subject it to exhaustive examination and reach its own independent findings. It should however remind itself that the trial court had the benefit of hearing the witnesses testify and therefore it was best equipped to assess their credibility. It should therefore not interfere with those findings by the trial court which are based on the credibility of the witnesses unless no reasonable tribunal could have made such findings or it is shown that there existed errors of law (*see* **Republic vs. Oyier [1985] KLR 353).**

19. The evidence before the lower court was that early in the morning of 26/05/08, PW1 and PW2 were robbed and their property stolen when the vehicle they were traveling in was ambushed in Kisima Area, along Kisima Suguta Marmar Road in Samburu. They were however unable to positively identify the accused persons as the robbers. The prosecution led evidence that the stolen property was found in the house of the 1st Appellant and the 2nd and 3rd Appellants were in that house. It was therefore asking court to infer that the stolen property was in their possession because they were in fact the robbers.

20. The principles on the doctrine of recent possession of goods were well explained by the Court of Appeal in **Issac Nanga Kahiga *alias* Peter Kahiga V Republic – Criminal Appeal No. 272 of 2005 *(unreported)* as cited with approval in Richard Oduor Adera V Republic [2010] eKLR :-**

"It is trite law that before a court of law can rely on the doctrine of recent possession as a

basis of conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first, that the property was found with the suspect, and secondly 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, as 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 the suspect and recovery of the alleged stolen property, and in our view any discredited evidence on the same cannot suffice no matter how many witnesses."

21. From the above case, the prosecution needs to prove that there was stolen property recovered and this property has to be positively identified by the complainants. PW1 and PW2 testified that early in the morning of 26/03/2009, they were attacked by 4 men and their property stolen from them. They gave details on the circumstances of the attack, that one man shot in the air and upon hearing the shot, the driver jumped out of the car while it was moving, that PW2 then took control of the wheel but the car hit a pillar near the bridge and stopped shortly thereafter. It is then the attackers caught up with them, asked them to get out of the car and lay on the ground, frisked them and left them at the scene and that the driver of the vehicle who had fled, came after the robbers had left and called the owner of the vehicle who in turn called the Police. The witnesses corroborated each other and their evidence was consistent and believable. The trial magistrate believed that the complainants were robbed as alleged in counts 1 and 2.

22. The property recovered was positively identified as the property of the complainants. PW1 identified a juice packet exhibit 1, Samsung M620 exhibit 2, Samsung S550 exhibit 3, Nokia 1112 exhibit 4 Nokia 6068 exhibit 5, Nokia 2760 exhibit 6 and a charger for X550 exhibit 7 as his. PW2 identified her phone exhibit 20, shirt exhibit 21 and Safari Boots exhibit 22 as her items which had been stolen during the robbery.

23. Having proved as above, the prosecution needed to satisfy the trial court that the appellants were in possession of the stolen property. PW6 testified that he and another officer, CIP Lumumba conducted a search on the 1st appellant's house where they recovered the above items. The 2nd appellant was seen running from the 1st Appellant's house and was arrested thereafter and the 3rd appellant was found hiding under the bed in the 1st accused's house. Both claimed that they had nothing on their person which belonged to the complainants. However, for a person to be deemed to be in possession of something under Section 4 of the Penal Code, he need not necessarily have it on his person. The said section defined possession as-

(a) "be in possession of" or "have in possession" includes not only having in one's own personal possession, but also knowingly having anything in the actual possession or custody of any other person, or having anything in any place (whether belonging to or occupied by oneself or not) for the use or benefit of oneself or of any other person;

(b) if there are two or more persons and any one or more of them with the knowledge and consent of the rest has or have anything in his or their custody or possession, it shall be deemed and taken to be in the custody and possession of each and all of them;

24. The 1st appellant was in possession of the stolen items because they were in his house. The 2nd appellant was seen running out of the 1st appellant's house on the day of the search when the stolen items were recovered while the 3rd appellant was found hiding under the 1st appellant's bed. By their conduct, it can be inferred that they knew that the items in the 1st appellant's house had been stolen and had consented to these items being in the house of the 1st appellant. For these reasons, we find and hold that although none of the stolen items were found on their person during the arrest, they were each in possession within the meaning of sub-section (b) of Section 4 above, of the Penal Code.

25. The prosecution also needed to prove that the items had only been recently stolen and that the time from when the items were stolen to when they are recovered in the possession of the appellants is not so long as for them to have changed hands, as a result of which the only reasonable conclusion would be that the appellant was the thief.

26. PW4 told court that he together with some officers went to the scene on the same night but waited until daybreak to go after the robbers. Although his trail went cold and they were unable to further pursue the robbers, they nevertheless had been informed of 2 suspects who had been involved in similar robberies. Acting on this information, they called the DC who summoned PW3 as his son was one of the suspects and the 1st accused resided in his area. PW3 informed them that he didn't know of the whereabouts of his son but he was able to lead them to the 1st appellant's house. They went there on the same day at around 3pm and recovered the stolen items in the 1st appellant's house.

27. Counsel for the Appellants however doubted whether there were any recoveries made as alleged as there was no inventory of the items recovered that was made. He also submitted that PW3 was not a *credible witness, that he made up his entire testimony in order to to exonerate his son who had also been charged as the 4th accused person, but whose charges were later dropped, that it was suspicious why the charges had been dropped against the 4th appellant person, yet he was one of the original suspects as per the testimony of PW4. The 1st accused also averred that he and PW3 were not in good terms and that is why he had given testimony against him. For these reasons, they asked court to expunge the evidence of PW3.*

28. The submissions by Counsel for the Appellant were not correct as the 4th appellant was PW3's nephew and not son as alleged. In any event, the evidence of PW3 was consistent and corroborated by the evidence before court and the testimony of other prosecution witnesses. He testified that he was summoned and asked to lead PW4 and PW6 to the 1st appellant's house. PW4 testified that it was informants not PW3 who had informed him of the involvement of the 1st Appellant in the robberies and the recoveries were made by PW6.

29. There was no evidence that was provided to prove the allegations that PW3 was biased or that he testified to save his nephew. Under Article 157(6)(c) of the Constitution, the Prosecution may discontinue criminal proceedings at any stage before judgment is delivered. Section 87 of the Criminal Procedure Code also allows the State to withdraw charges against an accused person but with leave of the court. The discontinuance however must be done with the permission of the court. In the present case, the prosecutor submitted that he had received instructions from the State Counsel at Nakuru. The letter with the instructions was submitted before the trial court and he was satisfied of the reasons given. In any event, PW3's testimony was very clear and consistent, there was no indication that he was being biased or that he was setting the appellants up. His testimony was corroborated by that of PW4 and PW6 who have no reason to be biased against the appellants.

30. The trial magistrate observed that PW4 and PW6 were truthful on the items that were recovered in the 1st Appellant's house and believed them. We therefore have no reason to doubt their testimony and do not think that the absence of an inventory casts any suspicion on their evidence. We therefore find that the stolen items were found in the possession of the accused persons.

31. Once it was established that the items in the appellants' possession had been recently stolen, the burden of proof shifted to them to explain how it had come to their possession. This is because the facts as to how they had acquired the property was especially within their knowledge and pursuant to the provisions of *section 111(1)* of the Evidence Act **Chapter 80**, the accused persons had to discharge that burden. The provision states:-

> ***"When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him."***

32. The appellants herein denied all the charges against them and in particular being in possession of the recovered items. They offered no explanation of how they came into possession of the stolen items. In the absence of such an explanation the trial court should have inferred that they were the thieves. In **Hassan v Republic [2005] 2KLR 11** the court held thus-

"Where an accused person is found in possession of recently stolen property in the absence of any reasonable explanation to account for this possession a presumption of fact arises that he is either the thief or a receiver"

33. The Court of Appeal in the case of ***Maina & 3 Others v Republic [1986] KLR 301*** *cited with approval the holding in the English case of* ***R v Loughin 35 CR. App R 69*** *on the inference to be drawn when a person is found in possession of stolen items-*

"if it is proved that premises have been broken into and that certain property has been stolen from the premises and that shortly afterwards, a man is found in possession of that property, that is certainly evidence from which the jury can infer that he is the housebreaker or shopbreaker."

34. The appellants did not in their defence offer any explanation as to how they had come into possession of the complainants' property. Their defence was a mere denial. In this case, we think that the trial magistrate ought to have found that in the absence of an explanation, then they were the thieves, even if they had not been identified at the scene as the robbers. The Appellants were charged under section 296 (2) of the Penal Code, which sets out different modes of committing the offence. ***Firstly,*** *if the accused is in company of one or more persons. The evidence on record shows that more than one person attacked each of the complainants.* ***Secondly****, if the offender is armed with an offensive or dangerous weapon. The evidence also shows that the appellants were armed with guns and a rifle. we therefore find that the ingredients of robbery with violence had been properly proved and that the trial magistrate erred in acquitting the accused persons of the 1st and 2nd counts.*

35. The Appellants herein had been charged for other robberies in other cases including Maralal SRM Criminal Case No. 66 of 2009. This case was heard and determined by the same magistrate. Counsel for the Appellant submitted that he had already formed an opinion from the previous cases and was therefore biased and that this case ought to have been heard by another court. We have read through the file and the judgment of the court and we find that the same was well reasoned and was based on evidence before the court. There is no indication that his mind was influenced by the other matters he had dealt with touching on the appellants. It was based solely on the issues and evidence that were presented before him.

36. In the upshot therefore, we find no merit in the Appellants' and supplementary grounds of appeal. We do however find the State's Cross-Petition of Appeal has merit and would allow it. We therefore quash the conviction and set aside the sentence on the alternative offence of handling stolen property and convict each of the Appellants for the offence of robbery with violence contrary to Section 295 as read with Section 296(2) of the Penal Code.

37. The punishment for the offence of robbery with violence is death. Article 26 of the Constitution guarantees the right to life which should not be taken away lightly by the State or the courts. The Appellants, though armed with dangerous weapons, a G3 Rifle and an AK 47 Rifle mercifully shot in the air, and did not cause any physical injury to any of the complainants. They however robbed their victims of their personal effects and cash, and threatened them with dire consequences unless they cooperated. A deterrent sentence is therefore called for.

38. We sentence each of the Appellants to thirty five years imprisonment to run concurrently with their sentences in Maralal SRMC Criminal Cases Nos. 196 of 2005, 66 of 2009, 67 of 2009 with no option of parole for twenty (20) years.

39. There shall be orders accordingly.

Dated, signed and delivered at Nakuru this 31st day of May, 2013

R. V. P. WENDOH ***M. J. ANYARA EMUKULE***

JUDGE ***JUDGE***