REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 528, 529 & 530 OF 2010

(From the original Conviction and Sentence in the Criminal Case No. 382/2009 of the Senior Resident Magistrate's Court at Taveta: C.N.. Ndegwa – SRM)

1. CHARLES CRISPUS KIMORI

2. STEPHEN GASPER MUTUA……APPELLANTS

VERSUS

REPUBLIC……..……..RESPONDENT

JUDGMENT

The two appellants namely **CHARLES CRISPUS KIMORI** (hereinafter referred to as the 1st appellant) and **STEPHEN GASPER MUTUA** (hereinafter referred to as the 2nd Appellant) have jointly filed this appeal in order to challenge their conviction and sentence on a charge of **ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296(2) OF THE PENAL CODE**. The particulars of the charge were given as follows:

> **"On the 11th day of July, 2009 at about 5.00 p.m. at Irrigation area Gicheha Farm in Taveta District within Coast Province jointly robbed PHILLIP JACOB UHURU of his mobile phone make Nokia 6030 and cash Kshs. 9,000/= all valued at Kshs. 18,700/= and at immediately after the time of such robbery used actual violence to the said PHILLIP JACOB UHURU."**

Both appellants were arraigned before the trial court on 17th September, 2009 when they each entered a plea of *'Not Guilty'* to the charge. Their trial commenced on 17th August, 2009. The prosecution led by **CHIEF INSPECTOR ONGERI** called a total of five (5) witnesses in support of their case. **MR. MAWASI** advocate represented both accused.

PW1 PHILLIP JACOB UHURU who was the complainant told the court that on 11th July, 2009 at 5.00 p.m. he was riding home on his bicycle having purchased 20 kg of maize. Suddenly he was attacked by the 1st appellant whom he knew as *'Rasta'* and another man who was unknown to him. The men pushed the complainant to the ground and robbed him of his Nokia mobile phone and cash Kshs. 9,000/=. The 1st appellant also hit the complainant on the left leg. The complainant reported the incident at Ziwani

police station. The following day the 1st appellant was arrested in his home. He led police to the home of the 2nd appellant. Police searched the home of the 2nd appellant and recovered a phone make Nokia, which the complainant identified as his and cash Kshs. 4,710/=. Both appellants were arrested and taken to Taveta police station. Upon completion of police investigations they were both charged. The complainant meanwhile was treated for the injuries he had sustained and was issued with a P3 form.

At the close of the prosecution case both appellants were ruled to have a case to answer and were placed onto their defence. The 1st appellant gave an unsworn defence while the 2nd appellant gave a sworn defence. Both denied any and all involvement in the robbery.

On 9th December, 2010 the learned trial magistrate delivered her judgment in which he convicted both appellants of the offence of Robbery with Violence and sentenced each one to death. Being aggrieved by both their conviction and sentence the appellants filed this present appeal. The appellants who were both unrepresented during the hearing of the appeal chose to rely entirely upon their written submissions. **MS. OGWENO** learned state counsel who acted for the respondent state made oral submissions opposing the appeal. As a court of first appeal it is now our duty to re-examine the evidence adduced by the prosecution witnesses and to draw our own conclusions.

The complainant was the only witness to this robbery incident. He told the court that the incident occurred at 5.00 p.m. – it was broad day light and he was able to see well. His attackers were unmasked thus there was no obstruction to his view of their faces. In his evidence the complainant stated at page 10 line 33.

> **"I did not know the accused persons before the incident."**

However, immediately thereafter at page 11 line 8 he contradicts himself and says:

> **"I knew that the person who had robbed me was Rasta and that is the description I gave to the police."**

From these two contradictory statements it is not clear whether the complainant did actually know the 1st accused or not. The complainant told the court that one '*Kenyatta Ivole'* led police to the house of 1st appellant. We cannot rule out the very real possibility that it was this Ivole who convinced **PW1** to identify the 1st appellant. This is more so given that the complainant did not indicate that he knew his attackers in his evidence in chief.

Regarding the 2nd appellant it was the 1st appellant who led police to his house. It was alleged that a mobile phone as well as cash 4,710/= was recovered from the 2nd appellant. The trial court therefore relied on the doctrine of *'recent possession'* as a basis for his conviction. However, the complainant did not identify the mobile phone as his by its serial number or by any other specific mark on it. To merely claim the phone as his is not sufficient identification. A Nokia is a very common mobile phone in this country. Several people own similar phones. There is nothing to prove that this particular phone belonged to the complainant and not to any other person. Similarly the recovery of cash 4,710/= does not link the 2nd appellant to this crime. The complainant had not recorded the serial numbers of the currency which he had on his person at the time he was robbed. The police only serialized the notes which they had recovered from the 2nd appellant after the said recovery. There is no proof that the notes recovered in the house of 2nd appellant were the very same notes which were stolen from the complainant. There is a break in the chain of evidence. As a court we cannot discount the claim by the 2nd appellant that the money belonged to him.

On the whole we find that the evidence adduced by the prosecution in this case was weak. There was only one eye-witness and his evidence on identification was contradictory. The trial court erred in relying on the doctrine of recent possession when there was no proof that the items recovered actually belonged to the complainant. We find that the evidence adduced by the prosecution in support of their case was not

convincing at all. The charge of Robbery was not proved beyond a reasonable doubt. Thus this appeal succeeds. We therefore quash the conviction of both appellants by the trial court. The subsequent death sentence is also set aside. Each accused is to be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered in Mombasa this 3rd day of September, 2013.

M. ODERO

JUDGE

M. MUYA

JUDGE