REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL CASE NO. 236 OF 2012

(as consolidated with No. 237 and 239 both of 2012)

(Appeal from the judgment of D. A. Orimba, Principal Magistrate, Thika)

1.STEPHEN KIMANI ROBE

2.JOSEPH MUIGAI KIMANI

3.DAVID NDERITU MWANGI.....….…..….APPELLANTS

VERSUS

REPUBLIC …….....……..RESPONDENT

JUDGMENT

The appellants were convicted by Thika Principal Magistrate of the offence of **robbery** with **violence**

contrary to **Section 296(2)** of the **Penal Code** and sentenced to suffer death as provided by the law. The appellants being aggrieved by the judgment filed separate appeals nos.236/12, 237/12 and 239/12 which were consolidated.

The grounds of appeal relied on briefly were: Lack of positive identification, contradictory evidence; ingredients of the offence not proved, parade conducted contrary to the law, failure to procure evidence of some key witnesses, shifting of burden of proof and defences not being considered. The first appellants filed written submissions while the 2nd and 3rd appellants gave oral submissions in support of their petitions.

The State opposed the appeal. Ms. Mwaniki argued that the complainant PW1 was able to positively identify the appellants having spent about 30 minutes with them negotiating the charges for the taxi hire. PW1 also drove with his assailants in the same car towards Githunguri from Ruiru town before he was abandoned along the way. The State argued that the appellants failed to exonerate themselves in their defences when they failed to give a satisfactory explanation as to recent possession of the stolen property. The state answered to all the grounds in the petition to the effect that all the ingredients of the offence were proved.

The brief facts of the case are that in the night of 3rd September 2010, the complainant who was a driver of a taxi operator at Ruiru town, was at his place of work when he was approached by the three (3) appellants to ferry them to Githunguri town. They negotiated the charges and agreed at KShs.700/= which the appellants paid. The complainant drove the three men towards Githunguri. On reaching Kangaita river, the appellants ordered PW1 to stop and pushed him to the back seat where he sat with the 2nd and 3rd appellants. The 1st appellant drove the vehicle up to Kambaa where PW1 was abandoned after being robbed of the vehicle registration no. KBM 294A, Toyota NZE.

PW1 was assisted by a cyclist to reach Githunguri police station where he reported the matter. Police circulated information on the stolen vehicle.

At Limuru Fly-Over, police manning a road block from Lari Police station arrested the three (3) appellants in possession of the complainant's vehicle. The three were subsequently charged with the offence after police completed their investigations.

The appellants raised the issue of the time the offence was committed arguing that PW1 did not give the time but only the date. In his testimony, PW1 gave the date of the offence as 3rd September 2010. It is correct that he did not give the time. However, he stated in his testimony:

"I told them (appellants) that I did not want to go to such a place (Githunguri) at night with the money

they were offering."

PW2 CPL Patrick Boloi from Lari police station testified.

"I do recall the night of 3rd and 4th at about 1.00 a.m. During that night I had laid a roadblock along Limuru Fly Over …. we were six (6) police officers."

The evidence of the two witnesses is clear that the offence took place at night before midnight. The appellants were arrested around 1.00 a.m. at Limuru area. The magistrate was aware of the fact that the offence was committed at night. He said in his judgment.

"The prosecution's case was that Francis Kariuki Kiarie a taxi driver was on duty at Ruiru township <u>at night</u> next to KCB when he was approached by 3 people who wanted to be taken to Githunguri *(emphasis mine)."*

The failure to state the time of the offence by PW1 is not fatal to the charge. The charge will not be rendered defective due to absence of dates. As the magistrate dealt with the issue of identification in his judgment, his mind was clear that the offence was committed at night. We find no merit in this argument.

The appellants raised the issue of key witnesses who were not called to testify. These are the taxi drivers at PW1's workplace and the cyclist who assisted PW1 to reach the police station and the owner of the vehicle. The evidence of PW1 is very clear that the cyclist did not witness the robbery. If he was called as a witness, he would only have testified about how he found PW1 at Kangaita River area after he was abandoned and then ferried him to the nearest police station. He was an important witness but failure to call him does not substantially affect the prosecution's case.

PW1 explained that the appellants talked to other taxi drivers after he declined the offer of the appellants the first time. He said in cross-examination by 3rd appellant;

"There are many taxis at the area I work from. You came back a second time after I initially declined. The other drivers knew that I had left because the vehicle left."

None of these taxi operators was called as a witness. There is no evidence that any of the taxi operators was present when the appellants negotiated and agreed with the complainant in order to say whether they

identified the appellants. According to PW1 the appellants talked to PW1 alone and moved to the other taxi operators when they failed to agree with PW1 on the charges. The appellants presented themselves as customers and it is unlikely that other drivers would have bothered to pay special attention to them. In the circumstances, the evidence of the taxi operators would not have added much value to the prosecution's case in our view. PW2 of Lari police station testified as the arresting officer thereby providing a nexus between the evidence of PW1 and PW3. PW3 is the officer who picked the appellants and the exhibits from Lari police and Kijabe police stations respectively.

It was alleged that the court relied on evidence which was not corroborated to convict the appellants. The law does not require corroboration of evidence in a case of this nature. The court may convict on the evidence of a single witness provided it is cogent. However, the magistrate however must warn himself/her of the danger of relying on a single identification witness as required by the law before conviction. The evidence on record distinguishes this case with one where the court solely relies on identification by a single witness in that there was recovery of the vehicle in possession of the appellants only a few hours after the robbery.

On perusal of PW2's evidence, it correct that he did not produce an inventory of the exhibits he recovered from the appellants. However, PW3 testified that he received all the exhibits recovered from the appellants from PW2 the following day (04/09/10) and took them to Ruiru police station where the case was to be investigated. The purpose of an inventory is to keep record of exhibits recovered during investigations. Failure to prepare an inventory cannot override the physical existence of the exhibits especially where other witnesses apart from the officer who made the recovery confirms their existence.

On the issue of identification several issues were raised: that the parade was not conducted in accordance with the law; that the source of light and its intensity which aided PW1 to identify the appellants was not given.

The parade was conducted by PW4 who testified that the 1st and 2nd appellant were identified by PW4 at Ruiru police station on 5th September 2010. PW4 said he conducted separate parades for each of the two appellants. The nine members of the parade were drawn from the remandees in the cells. His evidence was that appellants were satisfied with the parade and signed the forms accordingly. The parade in respect of the 3rd appellant was conducted by one CIP Mungai who did not testify. However, PW4 produced the parade form on behalf of CIP Mungai. The 3rd appellant signed the parade form as required.

The principles applicable in conducting an identification parade were set out in the Court of Appeal case of **Republic vs. Mwango s/o Manaa (1963) EACA 29** and are also provided for in the Kenya police standing orders. Briefly, the parade officer must be an officer who has not played any other role in the investigation of the case; that he must ensure that the witness does not see the accused before the parade is conducted; that the accused is allowed to take any position he chooses; that the members of the parade which should consist at least eight persons are as far as possible of similar height, age, general appearance and class of life; witnesses are not allowed to communicate with each other after they have taken part in the parade; the parade officer is required to make a careful note after each parade recording whether the witness identifies the suspect or other circumstances as the case may be.

Section 77 of the **Evidence Act** allows the court to use as evidence documents or reports by experts provided the signature and qualification of the maker are taken to be genuine. The court may summon such officers for examination if need arises. The ideal situation is where the maker of a document produces it in order to be interrogated in cross-examination on its contents. The parade form may also be produced by another police officer if the maker is not available. The prosecution did not explain why CIP Mungai was not called to testify. The 3rd appellant ably conducted his defence but did not object to PW4 producing the parade form. He appended his signature to the form at the time CIP Mungai made the document thereby confirming as correct the contents thereof. The record shows that PW4 answered questions which arose in cross-examination by 3rd appellant based on the contents of the form. We are of the opinion that no prejudice was caused to the 3rd appellant by failure to call the maker of the document.

From the record, it appears though vaguely that the only specific complaint about the parade was due to the fact that the parade members were not of similar height, size, age, general appearance and class of life. The members were drawn from remandees in the police cells who would be said to be of the same class of life in the circumstances depending on how long each had stayed in the cells. PW4 said he fully complied with the provisions of the law. During cross-examination and in their defences the appellants made no attempt to bring out the specific issues in the conduct of the parade which they considered not in compliance with the law. The appellants appended their signatures on the parade forms which signifies acceptance in the way the parade was conducted. The witness identified each appellant by touching them as required by the law and no objection was raised by the appellants. We find that in the absence of any specific allegations of non-compliance, the parade is presumed to have been conducted in a fair and proper manner.

PW1 said he spent about 30 minutes with the appellants as they negotiated the taxi charges. There is evidence that the parties failed to reach an agreement the first time. The appellants went to talk to other taxi drivers and failed to agree on the charges. The appellants returned to PW1 and negotiated again reaching an agreement of the charge at KShs.700/= for the journey. PW1 did not indicate the source of light which aided him to see the appellants. It is on record that PW1 in cross-examination by the 3rd appellant said:

"There was light and I saw you well."

The failure to state the source of light is not fatal to identification provided the witness describes the circumstances in which he was able to identify the suspect. The court must also satisfy itself that the conditions were favourable to positive identification. PW1 said he was opposite KBC and the place was lighted. The witness had ample time to observe the appellants in the well lighted area. PW3 confirmed that when PW1 was interrogated by him, he said he would identify the suspects. For sure, PW1 was able to identify them two days after the robbery in the parade.

The appellants travelled in the same car with the appellants for quite some distance before they attacked him. He was abandoned at Kambaa which is in Githunguri District. Although the distance from Ruiru to Kangaita river and Kambaa where PW1 was attacked and abandoned respectively was not given, this period presented to the complainant yet another opportunity to observe and interact with the appellants for ease of identification. The chain of events from the time PW1 was robbed of the vehicle to recovery and arrest of the appellants was not broken.

The appellants were arrested only a short while after attacking and robbing the complainant at Limuru Fly-over at a roadblock by six police officers who had been alerted through the car tracking network that the stolen vehicle was headed for Limuru.

On arrest the appellants were all in the vehicle with 1st appellant driving it. This confirms the evidence of PW1 that when he was bundled to the back seat, it was the first accused who had sat with PW1 at the front who took over the driving wheel. He drove the vehicle up to Limuru Fly-Over where he was arrested.

PW1 told the court that the appellants had something like a gun and had a rungu when they robbed him. He also said that the first accused cut his finger with a knife. PW2 said he recovered a toy pistol and a knife in the vehicle after all the appellants were ordered out of the car. PW1 also said that during the attack, he was hit on the head with a rungu. A knife was recovered from the 3rd appellant by PW2. Indeed, PW2 recovered two kitchen knives which were produced in evidence together with the toy pistol. Two driving licences belonging to PW1 and one William Tubi were recovered from the car. PW3 confirmed that PW1 and William are the ones who normally drove the car and had their licences kept inside the car. Although some of these exhibits were not produced in evidence, PW3 confirmed that he collected the exhibits from PW2 at Lari police station where they were kept overnight. This clears any doubt that the exhibits were recovered by Lari police. The rungu was not recovered and therefore could not be produced. The vehicle was photographed and the photographs produced in evidence bearing its registration number.

The appellants took issue with the failure to produce an official record of the stolen vehicle. The appellants did not claim ownership of the vehicle.

However, PW3 said in his evidence that he conducted a search and confirmed that the vehicle in question belonged to one William Tubi. PW1 said he was an employee of William Tubi and that the vehicle belonged to Jogas Taxis and Car Hire. PW3 did not produce the official search and as such it can only be assumed that William Tubi was the director of Jogas Taxis and Car Hire. He said: ***"I did a search and established that the motor vehicle belonged to the complainant."***

It is important to note that the ownership of the vehicle was not in dispute and the failure to produce the search in evidence does not cause any prejudice to the appellants. The evidence of PW3 to the effect that he established the ownership was sufficient in the circumstances.

The appellants were found in possession of the complainant's motor vehicle a short while after the robbery. They were arrested with the car at Limuru heading to an unknown destination. In their defence, the three appellants said they all come from Kijabe area. This court takes judicial notice that Kijabe is ahead of Limuru as one comes from Ruiru and Githunguri where the robbery took place. The appellants were most likely headed to Kijabe where they said they reside. In their defences, the appellants gave alibi defence denying presence at the scene of crime on the material day. The magistrate believed the evidence of PW1, PW2, PW3 and PW4 and convicted the appellants. Their defences were therefore considered but found incredible.

In the case of **Arum vs. Republic Court of Appeal at Kisumu Criminal Appeal No.85 of 2005** where it was held that the doctrine of recent possession is applicable where the court is satisfied that the prosecution have proved the following:

a) that the property was found with the suspect;

b) that the property was positively identified by the complainant;

c) that the property was stolen from complainant;

d) that the property was recently stolen from the complainant.

The court in that case upheld the conviction of the appellant based on recent possession as opposed to identification by the complainant. In the case of **George Otieno Dida alias Stevo & Another vs. Republic**, the appellants were found in possession of the stolen property about four (4) hours after the robbery. There was no identification by the complainant of his assailants. The Court of Appeal upheld the conviction based on recent possession on grounds that it was found on sound legal principles.

The doctrine of recent possession is applicable in the circumstances of this case. The appellants did not offer any explanation as to how they came into possession of the motor vehicle which had been stolen a few hours earlier. The burden of proof as to possession of the vehicle shifted to the appellants when they were arrested driving it and were subsequently charged. The appellants were not known to PW1 or to the arresting officers. This rules out any possibility of framed-up of the charges.

We have re-evaluated the evidence and found that the appellants jointly attacked the complainant and robbed him of his motor vehicle and other items. At the time of the robbery, they were armed with dangerous weapons namely rungus, knives and a toy pistol The complainant was injured during the said robbery and treated for the injuries as shown in the P3 form. We wish to point out that it is not necessary to prove all the ingredients of the offence of robbery with violence under the law. It is sufficient for the prosecution to prove either that the accused was accompanied by another person or persons at the material time or was armed with a dangerous weapon and that violence was used during, at or immediately before or after the robbery. The magistrate evaluated the evidence and reached a correct finding that the prosecution had proved the offence against the three appellants.

The appeal has no merit and it is hereby disallowed. The conviction and sentence are hereby upheld.

F. N. MUCHEMI **G. ODUNGA**

JUDGE **JUDGE**

Judgment dated and delivered on the **29th** day of **November 2013** in the presence of the appellants and the State counsel Mrs. Mwaniki.

F. N. MUCHEMI **G. ODUNGA**

JUDGE **JUDGE**