REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 157 OF 2012

CONSOLIDATED WITH NO. 158 OF 2012

(From Original Conviction and Sentence in Criminal Case No. 1608 of 2010 of the Principal Principal Magistrate's Court at Kwale – E. K. Usui Macharia, PM)

ISSACK SAMUEL KILONZI …………………..……………….1ST APPELLANT

SAMUEL MWANGI NJOKI ………………...…..……………. 2ND APPELLANT

V E R SU S

REPUBLIC ………………………..…………………………. RESPONDENT

JUDGMENT

1. The Appellants were charged before the Principal Magistrate's Court, Kwale with two Counts of the offence of Robbery with Violence. In the particulars of the offence in respect of the first count it shows that the robbery was against Said Mohamed Gasari who was robbed one monitor make SP-Compaq valued at Kshs. 18,000/- and one radio make Sonitech, mobile phone Nokia valued at Kshs. 3,500/- and cash Kshs. 40,000/-.

2. In respect of the second count the robbery was against Mwagasambi Gasari Sudi. He was robbed off one Eveready torch valued at Kshs. 300/-.

3. Appellants were convicted on both counts and were sentenced to death on first count whilst the sentence of the second count was held in abeyance.

4. The present appeals are directed against the conviction and sentence.

5. Mohamed Gasari (PW1) and Mwagasambi Gasari Sudi (PW2) were on duty as watchmen on 21st October 2010 at about 2.30pm at the CDF offices in Kwale.

6. PW1 saw three people appear at the sentry window they said they were police officers. One of them according to PW1 wore black and green jacket and black trousers. He had a pistol and another had a torch. They did not wear any disguise. The intruders were medium height. They ordered him to open up the sentry box. They were three feet away from him. They entered and announced that they were thieves. They stood close to PW1. The one with black trousers tied the hands of PW1. The intruders took PW1's bow and arrow and his phone Nokia 1208. PW1 said

that there was light at the door. The intruders asked him whether there was another watchman with him. When he confirmed they ordered him to call him. When PW2 came he was ordered to lie near PW1. The robbers then started breaking the doors with metal bars. The robbers were in the company of PW1 and 2 for about 15 minutes. This is what PW1 stated-

> ***"I saw their faces very well. One was slightly light with muscles with a white T-shirt. The other was dark with short hair with black/blue jacket and black trousers. The other had a navy blue trouser and also slightly light in complexion."***

7. PW1 and 2 untied themselves once the robbers left. When the manager and executive officer arrived it was discovered that a computer, radio and a torch were missing. Later the police conducted an identification parade where they were nine members. PW1 was able to pick out the Appellants. PW1 in respect of the second Appellant again stated-

> ***"At the sentry gate I saw the accused very well. The bulb was right above. He was the first to enter and he tied me. He wore a blue jacket and a black jacket (sic) and a blue trouser."***

8. In the second parade PW1 identified the first Appellant and this is what he said about the first Appellant-

> ***"I identified first Accused as he was muscular with Nido shoulders. His shoulders are wide. He still looks the same …. He is the one who took my bow. He wore a yellow T-shirt and black trouser."***

It should be noted that the trial Court Magistrate stated in the

proceedings that the first Appellant had wide shoulders."

9. On being cross examined by the second Appellant PW1 stated-

> ***"At the gate is a very clear light. Its security light."***

10. PW2's evidence in chief collaborated PW1's evidence of how PW1

called him on the night in question and how the robbers tied them and also tied PW1. He said that the robbers pointed a gun at him. He was able to observe the attackers. He said that the first attacker had a yellow sweater and the second Appellant had a blue jacket. In respect of the light he said-

> ***"Our security lights were on. At the reception my (sic) fluorescent tubes were on and the illuminated the area well. The first and second accused were amongst the thugs."***

PW2 lost in that robbery an Eveready battery torch and a radio. The silver torch before Court was his. He noted that it had a dent on its side which dent was caused by his children who had previously hited it with a hoe. He also identified the radio before Court. He knew it was his radio by the fact that it had no battery cover.

11. Mwanahamisi Salim she was the wife of PW1 she said that she had

given her phone to PW1 in order for him to charge it for her at his place of work. She was able to identify the phone before Court as the one that belonged to her. She identified the phone by the marking she had made on the phones battery of her initials that is M/S. She also produced before court the receipt of that phone which receipt bore serial number of the phone before Court.

12. Isaac Macharia Maina was PW4. He was a matatu conductor which

operated on the route of Kwale to Likoni. He normally started his day of work at 3.30am and at 5.00am the matatu would arrive at Likoni. On 21st October 2010 at 4.45am at Mukoroshoni Kwale he picked three people. One was his usual customer but two others were not known to him. Later when the police stopped the matatu the two that were not familiar to him were arrested with a bag. PW4 was able to see some of the contents of the bag. He saw a metal bar and a torch. He confirmed that the two that were arrested were the Appellants that were before the Court. When they were at the matatu they both looked unsettled.

13. Peter Mwasela (PW5) was the manager of CDF Matuga. When he

checked the CDF office after the robbery he found that a computer 17 inches monitor was missing valued at Kshs. 18,000/-. Also missing was Kshs. 40,000/- from the draws.

14. Sergeant John Mwenda (PW6) said that at 4.30am on the night in

question he received information about a robbery at the CDF office. He confirmed together with his fellow officer that the robbery had taken place. Thereafter they lay an ambush at Binuni Area. They stopped a matatu and noted the Appellants in that matatu. The 1st Appellant was found in possession of a metal bar which he said was his tool of trade. He said that he used the metal bar in his masonry work. The second Appellant had a black bag inside the bag was hacksaw, a hammer, navy blue jacket, trousers, radio, pliers, metal, chiesel, torches, silver torch amongst other things. Both Appellants were arrested and on identification parade being mounted were identified by PW1 and 2. On being cross examined this witnessed confirmed that the phone of PW2 was found on the person of first Appellant.

15. PW7 Inspector of Police Patrick Kubasu produced identification

parade forms which parade he conducted on 22nd October 2010. He confirmed that the Appellants were positively identified by both PW1 and 2.

16. In his defence the first Appellant gave unsworn testimony while

second appellant gave evidence under oath.

17. The first appellant said that the night in question at 4.25am he was

travelling to his place of work at Likoni. When the bonded the matatu he sat at the back the police stopped the matatu and ordered the people on bond to get out and for the luggage to be removed. There was some luggage which was not claimed by the passengers on the matatu. Those who did not have luggage were taken to the police station. He was placed in the cell and was later placed on an identification parade. On that identification parade he was without a shirt or shoes. He was picked from that identification parade by two men.

18. Second Appellant who gave sworn statement said that he was a

security guard with a firm called Jokan Security Services. He denied the charged and said that the night in question he was on the way to duty. He said he was arrested at a stage and place at an identification parade. He was made to wear a jacket when he was picked by two men who had seen him the day before.

19. The Appellants in support of the Appeal relied on written submissions.

We shall consider those submissions under various heads. The Appellant faulted their conviction on the ground that the charge sheet failed to state that the iron bar and the big hammer were offensive weapons. The Appellants argued that the failure to state that those were offensive weapons rendered the charge sheet defective.

20. In our view the failure to state that those items were dangerous does

not render the charge to be defective. We therefore discount that argument and place our reliance on the case **NAIROBI HIGH COURT CR. NO. 10 OF 2004 GEORGE MBUGUA THIONGO -Vs- REPUBLIC** where the learned judges stated-

> ***"A knife is not ordinarily an offensive or dangerous weapon. It becomes offensive or dangerous depending on what use it is put to and the circumstances under which it is used."***

We make a finding that the Appellants used the hammer and iron bar to carry out the robbery against the complainants.

21. The other issue raised by the Appellants was that the charge sheet

recorded that one of the items stolen was a radio of Sonitech make the evidence however adduced by PW6 shows that the radio recovered from second Appellant was a Sonimax make. The appellants submitted that the variance between the charge sheet and that evidence rendered the charge to be defective.

22. In our view it does not. It is not a variance that would lead us to find

that the charge sheet was defective. It was not an error in our view that would lead to failure of justice. In this regard we refer to Section 382 of the Criminal Procedure Code Cap 75 which provides as follows-

> ***"Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:***
>
> ***Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."***

23. On the identification of the Appellant it was submitted that the

evidence of PW1 and 2 could not be relied upon because they did not state that they could identify them on their first report. In the case **MAITANYI -VS- REPUBLIC [986]KLR 198** the Court stated-

> ***' ..There is a second line of inquiry which ought to be made and that is whether the complainant was able to give some description or identification of his or her assailants, to those who came to the complainant's aid, or to the police. In this case no inquiry of any sort was made...If a witness receives a very strong impression of the features of an assailant; the witness will usually be able to give some description. If on the other hand the witness says that he or she could not identify or recognize the person, then a later identification or recognition must be suspect, unless explained.'***

24. It will be noted that PW1 was not questioned on whether he made

reference to the description of the Appellants identification in his first report. He however consistently referred exactly to what each appellant did that is the role they played during the robbery and their manner of dressing. Similarly, so did PW2. More importantly PW2 stated that

he did make reference to the way the second Appellant was dressed in his first report. We do find that PW1 and 2 corroborated each other on the identification of the Appellants. The robbery was undertaken by a large group of people but what assisted PW1 and PW2 to identify the Appellants was their close proximity during the robbery. PW1 talked of the second Appellant who was close to security lights when the robbers first approached. He was also the one who tied up PW1. The first Appellant was identified due to his physique and the fact that he was wearing a T-shirt. The first Appellant's submission on the issue of first report has no basis.

25. On our part we find that the prosecution's evidence was corroborative

and consistent and it proved the charges against the Appellants beyond reasonable doubt.

26. We also find that the doctrine of recent possession was proved by the

prosecutor. In this regard we rely on the case **R -VS- LOUGHLIN 35 CR. APP. R69** LORD C. J. OF ENGLAND held-

> ***"If it is proved that the premises had been broken into and that certain property had been broken into and that certain property had been stolen from the premises and that very 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 house breaker or shop breaker."***

This decision was quoted with approval in Kenya Court of Appeal case **SAMUEL MUNENE MATU –VS- REPUBLIC CRIMINAL APPEAL NO. 108 OF 2003**.

27. We have considered the evidence of prosecution we have evaluated it and we have drawn our own conclusion. We have found that the trial Court judgment should be upheld and for that reason the appeal is hereby dismissed.

Dated and delivered at Mombasa this 28th day of November, 2013.

MARY KASANGO

JUDGE

M. MUYA

JUDGE