REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CRIMINAL APPEALS 484 and 485 OF 2009

KYALO MUTHIANI KIETI……..……..…….....……..1ST APPELLANT

DAVID KAGIA KURIA…….....…….....……..2ND APPELLANT

VERSUS

REPUBLIC……..……
RESPONDENT

(An Appeal arising out of the conviction and sentence of Mrs. T.W.C. Wamae SPM in Criminal Case No. 1942 of 2008 delivered on 30th October 2009 in the Chief Magistrate's Court at Nairobi)

JUDGMENT

The 1st and 2nd Appellants were charged with 2 offences. The first offence was that of robbery with violence contrary to section 296 (2) of the Penal Code. The particulars of the offence were that on the 9th day of September, 2008 at Garden Estate in Nairobi within Nairobi Province jointly with others not before court, while armed with pangas and swords robbed off Margaret Nchabira Kirai a Vodafone 810 S/NO. 356559013153338, Nokia S/NO. 3555370177721384, Telcom wireless WD 200, Digital Camera, Samsung L60, Laptop make Sitecom-CN-504, 2 wristwatch, 2 pairs of shoes, 2 plays Stations and Cash Kshs.5,000/= all totalling to Kshs.225,600/=, and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Margaret Nchabira Kirai.

The Appellants were also charged with an alternative offence of handling stolen goods contrary to section 322(1) of the Penal Code. The particulars of this offence for the 1st Appellant was that on the 14th day of November, 2008 at Mathare Kosovo in Nairobi within Nairobi Area, otherwise than in the course of stealing dishonestly assisted in disposal of cellphone make Vodafone 810 S/NO. 356559013153338 valued at Kshs.14,000/= knowingly and having reasons to believe it to be stolen goods.

The particulars of the alternative offence for the 2nd Appellant was that on the 30th day of November 2008 at Mathare Kosovo in Nairobi Area otherwise than in the course of stealing dishonestly retained Cellphone make Nokia 5200, IMEI Number 355537017721384 valued at Kshs.9,000/= knowingly and having reasons to believe it to be stolen goods.

The Appellant were arraigned in the trial court on 27th November 2008 and pleaded not guilty to all the charges against them. They were tried, convicted of the offence of robbery with violence and sentenced to death. The Appellants being aggrieved by the judgment of the trial magistrate appealed both his

conviction and sentence. The grounds of appeal for the 1st Appellant were that there was no positive identification that was made of him and that the trial magistrate erred in finding that the doctrine of recent possession applied to him. The 2nd Appellant's grounds of appeal were that the trial magistrate erred in relying on the doctrine of recent possession and that his conviction was not supported by sufficient and credible evidence.

Ms Matiru for the State opposed the appeal and submitted that the two Appellants robbed PW1 of goods from her home, and that there was enough light to identify the Appellants. Further that PW2 stated that there was electric light at the corridor where the offence was committed, and he was also able to identify the 1st Appellant in an identification parade. Ms. Matiru also submitted that the goods that were stolen were recovered from the Appellants, and PW1, PW2 and PW4 were able to positively identify the recovered good as those stolen from their home. Ms. Matiru also submitted that the Appellants were unable to explain how they came to be in possession of the goods.

A brief summary of the evidence adduced before the magistrate's court is as follows. The prosecution called six witnesses. PW1 was Margaret Nchabira Kirai the complainant, who testified that on the night of 8th and 9th September 2008 at 3.00 am at her home in Garden Estate, she was awoken in her bedroom by her daughter who was with five men. The five men proceeded to take Kshs 5,000/= one laptop, 2 digital cameras, a sanyo camera and 5 mobile phones, two playstations, a DVD machine, five pairs of trousers and four pairs of shoes. She testified that these items were stolen from her bedroom, and also from rooms downstairs where she was thereafter led by robbers.

PW1 stated that the neighbours called the police who came and visited the scene. She identified three of phones that were recovered and produced in court as the ones that were stolen. She stated that the phones belonged to her, her husband and daughter. She stated that the serial numbers of the telephones were the same as those in the cartons in which they were bought, which were left in her home. She also testified that she was not able to identify the robbers.

PW2 was Collins Muriuki, a minor aged 11 years and a son of PW1, who gave a sworn statement. He stated that in September 2009 some people came to their house while they were sleeping and robbed them of his play station, camera, phones, money his mother's handbag, a DVD and a bag. He stated that he was in his bedroom with his sister when the people came and that he went to the corridor and put on the lights. He stated that the robbers had not covered their faces and he was able to identify them from the light at the corridor, and that they were carrying pangas (machetes). He stated that on 22/11/2008 he was taken to an identification parade at Kasarani Police station where he was able to identify the 1st Appellant.

PW2 also identified the phones produced in court as one belonging to her sister because of the message that appeared when the phone was switched on being "Welcome to Kendi World…" which was confirmed in court. He stated that he was given one of the other phones by his father, and one of them belonged to his mother. He stated he could identify them through their serial numbers.

PW 3 was Fundi Mwinyi, a taxi driver who stated that he lives in Eastleigh. He testified that on 19/9/08 while on duty at Eastleigh the 1st Appellant approached him and requested for money to take his child to hospital. Further that the 1st Appellant gave him a vodaphone phone, which was one of the phones produced in court. PW3 stated that he gave the 1st Appellant Kshs 1,700/= who promised to return the money and get the phone back. However, that the 1st Appellant never came back, and PW3 stated that on 14/11/2008 he was arrested by the police for robbery with violence. He further stated that he informed the police that he had been given the phone by the 1st Appellant. PW3 testified that he directed the police to where the 1st Appellant was and stated that he had known the 1st Appellant from 2007 who he used to see in Eastleigh, and who had told him that he was a caretaker of a plot in Mathare.

PW4 was Sharon Kendi Kirai, the daughter of PW1 and sister to PW2, who stated that on the night of 9/9/2008 at 3.00am while asleep, a man who was in the company of five other men came to her bedroom and woke her up, and told her to take them to her mother's bedroom. They also took her laptop, mobile

phone Nokia 5200 and camera from her bedroom. PW4 stated that the men were armed with pangas and rungus and that they threatened her mother with the panga if she screamed.

She testified that the robbers took watches, shoes, a laptop and mobile phones from her mother's bedroom, and that her brother came and put on the lights in the corridors and told the robbers not to harm her mother. The robbers told him to switch off the lights which he did. PW4 further stated that the robbers took them downstairs where there were 3 other men, and they took money from her mother's purse, a video deck and a play station. She testified that the robbers left after they promised not to scream, and they later called their father who was in Meru and who called the police.

PW4 stated that on 22/11/08 she was taken to the police station and identified three phones that had been stolen. She stated that one of the phones was hers which she identified from the welcome message and unique wallpaper on the screen of the phone, one belonged to her mother and the other was unused. She also stated that she attended an identification parade but was not able to identify any of the robbers.

PW5 was IP Charles Ogeto who stated that he was with the anti-corruption police unit and formerly with the CID at Kasarani. He stated that on 22/11/08 while at work he was requested by IP Omondi and Cpl Shogo to undertake an identification parade. He stated that he went to the cells and called the suspect who did not object to the identification parade. He stated that he arranged the suspect among 8 persons of similar appearance whose particulars were recorded in the identification parade form. He further stated that the suspect chose to stand between members number 5 and 6.

PW5 testified that PW3 was called to identify the suspect but that she was not able to identify him. He stated that he then called PW2 who was able to identify the suspect who was the 1st Appellant by asking him to turn and speak, and touching him.

The last prosecution witness was PW6, Cpl John Shogo of CID Kasarani, who testified that on 9/9/2008 while on duty within Kasarani they received a report at around 3.00am that a robbery had occurred at Garden Estate, and that they visited the scene where they found PW1, PW2 and PW4. They were given details of the items that had been stolen as Ksh 5,000/=, 6 mobile phones, a laptop and a wireless phone, and that he was given the serial number of the stolen phones and laptop. He testified that PW2 and PW4 stated that they recognised the robbers as they had switched on the security lights in the house.

PW6 stated that they were able to trace one of the Vodafone phone to PW3 after getting a report from Safaricom on 14/11/2008 that he had been using it in Mathare area, and they arrested him. Further, that PW3 identified the 1st Appellant as the person who had given him the phone and they arrested the Appellant at Mathare area. PW6 also stated that they recovered a Samsung phone from the 1st Appellant. He testified that the 1st Appellant was positively identified at an identification parade by PW2.

PW6 further testified that on 30/11/2008 they got another report from Safaricom that the Nokia phone 5200 was being used and traced and recovered the phone from the 2nd Appellant at Mathare area on the same date. He stated that PW1, PW2 and PW4 were able to identify the phones as theirs, and the Appellants were not able to explain how they came to be in possession of the phones, and were charged in court. He produced the vodaphone phone, the Samsung phone and Nokia 5200 phone, as well as the cartons for the vodaphone phone and the Nokia 5200 phones as exhibits.

After the close of the prosecution case and submissions by the counsel for the 2nd Appellant, the trial magistrate found that the evidence on record was sufficient and placed the Appellants to their defence. The 1st Appellant gave unsworn evidence and did not call any witnesses. He testified that the phone was recovered from PW3 and he denied giving the phone to PW3 as alleged or committing the robbery. He stated that PW3 gave false evidence because they had a previous disagreement.

The 2nd Appellant also gave unsworn evidence and did not call any witnesses. He stated that he was at his place of work on 31/11/2008 when three policemen came and searched his business and asked for his phone. He stated that he gave them the phone and told them that he had been given the phone by a

neighbour called Mohammed Diba as security for the sum of Kshs 3,000/= he had lent him. He stated that he did not know that the phone was stolen, and that he used it from 25/11/2008 to 30/11/2008. He denied committing the robbery.

We have considered the arguments made by the Appellant and the State. Our duty as the first appellate court is to re-evaluate the evidence and draw independent conclusions as held in **Okeno v Republic (1972) E.A. 32**. However, we are alive to the fact that we do not have the advantages enjoyed by the trial court of seeing and hearing the witnesses as observed in **Soki v Republic (2004) 2 KLR** 21 and **Kimeu v/s Republic (2003) 1 KLR 756.**

We accordingly find that the issues for determination in this appeal are whether from the evidence adduced in the trial court, there was a positive identification of the 1st Appellant, whether the doctrine of recent possession applied to both Appellants, and whether there was sufficient evidence to convict the 2nd Appellant. The 1st and 2nd Appellants submitted written submissions, which they relied on for their appeal.

On the issue raised of the positive identification of the 1st Appellant, it was submitted by the said Appellant that the identification of relied upon by the trial magistrate was based on a described light, and that the time PW2 took in observing the assailants was also not suggested. He also submitted that the case against him was based on a single identifying witness, and PW2 made no references to any marks or unusual features that enabled him remember him. The 1st Appellant relied on the decisions in **Charles Olinda Maitanyi v Republic CRA No. 6 of 1986 C.A**, **Abdalla Bin Wendo and Another v Republic (1953) EACA 166** and **Gabriel Kamau Njoroge v Republic (1982) 1 KAR** in this regard.

In determining this issue we are reminded of the guidelines in the case of **Mwaura v Republic [1987] KLR 645**, in which the Court of Appeal held, inter alia,that:

> **"In cases of visual identification by one or more witnesses, a reference to the circumstances usually requires a judge to deal with such matters as the length of time the witnesses had for seeing who was doing what is alleged, the position from the accused and the quality of light".**

We are also aware of the danger of convicting an accused person on the basis of the evidence of a single identifying witness made in difficult circumstances. as was held in **Maitanyi –Vs- Republic [1986] KLR 198 at 200**:

> **"Although the lower courts did not refer to the well-known authorities Abdulla Bin Wendo & Another vs Reg (1953) 20 EACA 166 followed in Roria vs Rep (1967) EA 583, it may be that the trial court at least did have them in mind. It is important to reflect upon the words so often repeated and yet bear repetition:-**
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> > **"Subject to well-known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error".**

In addition, we are also reminded of the procedure for identification parades as laid out in case of **R V. Mwango s/o Manaa (1936) 3 EACA 39**

In the present appeal the robbery took place at night, and PW2 stated that he was able to see the 1st Appellant from a light on the corridor that he switched on, and that the 1st Appellant passed on that corridor when the lights were on. He stated that he was able to see him clearly. PW4 in her testimony

stated that the assailants told them to switch off the lights when PW2 put them on, and it was not stated for how long the said lights were on.

The 1st Appellant was later identified by PW2 at an identification parade. PW2 in his testimony stated that he did not give a description of the 1st Appellant to the police. Further, that the identification parade had 10 members whom he described as follows upon cross-examination as page 22 of the proceedings:

> **"Some were tall, others were short,**
>
> **Others were dark and others light skinned**
>
> **Some were fat and others were slim"**

PW5 however testified that he put people who were similar in resemblance to the 1st Appellant for the identification parade.

It is thus our finding that the identification parade was irregular to the extent that the 1st Appellant was not placed among persons of as similar appearance as him. It is also our finding that there are inconsistencies in the evidence given by the prosecution witnesses as to the circumstances of the identification of the 1st Appellant that makes it unsafe to make a finding that there was a positive identification of the 1st Appellant.

This leads us to the second issue of whether the doctrine of recent possession applied to the Appellants, which could also be relied upon as corroborating evidence of the identification of the 1st Appellant. The 1st Appellant in this respect submitted that PW3 identified the man who gave him the vodaphone phone as Kikima Mbooni. He also submitted that at the time of his arrest PW3 was in custody, and only identified him at the dock. The 2nd Appellant on his part submitted that the court relied on hearsay evidence by PW6 to the effect that they received information from Safaricom in terms of the information received as to the use of the Nokia phone. Further, that the said Nokia Phone which was said to be in his custody was given divergent serial numbers in the charge sheet and in the evidence by PW1. Lastly the 2nd Appellant submitted that a period of 3 months was too long to invoke the doctrine of recent possession. He relied on the decisions in **Kigecha v R (1965) EA 773** and **R v Cash (1985) Q.**B **801** in this respect.

We are on this issue guided by the following elucidation of the doctrine of recent possession given in the case of **Malingi vs Republic (1989) KLR 227**:

> **"The doctrine in one of fact. It is a presumption of fact arising under section 119 of the Evidence Act, Cap 80 Laws of Kenya which provides:**
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> **"The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case."**
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> **So as applies to the offence of theft or handling, recent possession raises a presumption of fact that the one in possession is either the thief or guilty receiver (R – v – Hassan s/o Mohamed (1948) 25 EACA 121). The trial court has the duty to decide whether from the facts and circumstances of the particular case under consideration the accused person either stole the item or was a guilty or innocent receiver. By the application of the doctrine the burden shifts from the prosecution to the accused to explain his possession of the item complained about. He can only be asked to explain his possession after the prosecution have proved certain basic facts. Firstly that the item he had in his possession had been stolen; it had been stolen a short period prior to the possession; that the lapse of time from the time of its loss to the time the accused was found with it was, from the nature of the item and**

circumstances of the case, recent; that there are no co-existing circumstances which point to any other person as having been in possession of the item. The doctrine being a presumption of fact is a rebuttable presumption. That is why the accused is called upon to offer an explanation in rebuttal, which if he fails to do an inference is drawn that he either stole it or was a guilty receiver."

We note that in the present appeal PW1, PW2 and PW4 were able to positively identify the Vodafone phone and the Nokia 5200 phone from the serial numbers found in the cartons the phones were bought in, which were left at their home after the robbery. PW4 was able identify to the Nokia 5200 phone from its unique welcome message that was confirmed in court.

It is our finding that it was established by the prosecution that the two phones were the ones stolen. These two phones were recovered from PW3 and the 2nd Appellant on 14/11/2008 and 30/11/2008 respectively, two months after the robbery. PW3 stated that he was given the phone by the 1st Appellant on 19/9/08 which was 10 days after the robbery. He led the police to the 1st Appellant, whom he said he knew and recognised. The only requirements of the doctrine of recent possession that therefore need to be interrogated are whether the Appellants were in possession of the stolen phones, and if this possession was recent in the circumstances of the case.

We have no doubt in our mind that with respect to the 1st Appellant, the stolen phone was not found in his possession but in the possession of PW3. This fact alone qualifies to make the doctrine of recent possession inapplicable to the 1st Appellant. We also note that when he was arrested he was found in possession of another phone, a Samsung, which PW 1 claimed belonged to her, She was however not able given any evidence of its purchase or ownership. Further, PW3 stated that he was given the phone by the 1st Appellant on 19/9/2008, yet PW6 testified that it was used by the PW3 from 17/10/2008. It is therefore possible that the phone could have been given to PW3 on 17/10/2008 and not on 19/9/2008.

We however find that the Nokia Phone was proved to be in the possession of the 2nd Appellant, as he does not deny that he gave it to PW6. We however do not find his possession to be recent, as a period of over two months is long enough to break possession, and it is possible that the stolen phone could have changed hands during that period. It is thus our finding that the application of the doctrine of recent possession was erroneously applied to the 1st and 2nd Appellants.

The last issue for determination in this appeal is whether there was sufficient evidence to convict the 2nd Appellant for the offence of robbery with violence. The 2nd Appellant in this regard submitted that he was not identified as one of the assailants at the scene of crime, that the court convicted him on the evidence of a single witness, and that there was no evidence that connected him to the charge of robbery with violence or the 1st Appellant. He relied on the decision in **Yongo v R (I983) KLR 324** on the elements of a defective charge.

We are guided in this respect by the decision in **Johanna Ndungu Vs Republic, Cr. App No. 116 of 2005 (unreported)** which sets out the ingredients for robbery with violence under section 296(2) of the Penal Code to be as follows:

1. **If the offender is armed with any dangerous or offensive weapon or instrument, or**
2. **If he is in the company with one or more other person or persons, or**
3. **If at or immediately before or immediately after the time of the robbery, he wounds, beats strikes or uses any other violence to any person.**

We are also alive to the requirement that proof of any one of the above ingredients of robbery with violence is enough to base a conviction on under section 296 (2) of the Penal Code as was held in **Oluoch vs Republic, (1985) KLR 549**.

The particulars of the charge of robbery with violence against the 2nd Appellant specify that he, jointly

with others who were not before the court and while armed with pangas and swords robbed PW1 of various items. However, upon re-evaluation of the evidence before the trial court, we have not found any evidence by the prosecution that placed the 2nd Appellant at the scene of the robbery. The only evidence linking the 2nd Appellant to the robbery was his possession of one of the stolen items, and we have already discounted the application of the doctrine possession to him in this respect. It is thus our finding that the prosecution did not prove beyond reasonable doubt that the 2nd Appellant committed the offence of robbery with violence.

Having carefully reviewed the evidence and considered the facts of this appeal, we are of the view that the offence disclosed by the evidence in the trial court is that of handling stolen goods contrary to section 322(1) of the Penal Code and not robbery with violence under section 296(2) of the Penal Code. The offence of handling stolen goods is cognate and a lesser offence to that of robbery with violence. The Appellants are thus acquitted of the charge of robbery with violence contrary to section 296(2) of the Penal Code but are convicted of the disclosed offence of handling stolen goods contrary to section 322(1) of the Penal Code. The sentence imposed on the Appellants of death is hereby consequently set aside and shall be substituted by an appropriate sentence of this court.

As regards sentence, the Appellants has been in lawful custody since their arrest in November 2008. We sentence the 1st and 2nd Appellants to each serve six (6) years imprisonment with effect from 30th October 2009 when they was convicted and sentenced by the trial court.

It is so ordered.

DATED AT NAIROBI THIS 12TH DAY OF NOVEMBER 2013.

L. KIMARU

JUDGE

P. NYAMWEYA

JUDGE