REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 69 OF 2012

CONSOLIDATED

WITH CRIMINAL APPEAL NO. 70 of 2012

BETWEEN

DANIEL NJIRU TIRAS .....……...…….…....1ST APPELLANT

CHARLES KIMANI KABARI ……..…... 2ND APPELLANT

AND

REPUBLIC …….....…RESPONDENT

(Being an appeal from the original conviction and sentence in Embu Criminal Case 1407 of 2010 by Hon. L.K. Mutai (S.P.M) on 29th July, 2011)

JUDGMENT

The two appeals, being **Criminal Appeal No. 69** and **No. 70 of 2012** were consolidated and heard together as they relate to the same incident. The two appellants were among the four accused persons charged in the subordinate court.

The appellants, **Daniel Njiru Tiras** and **Charles Kimani Kabari** and two other named persons were jointly charged and convicted of count of robbery with violence contrary to **section 296(2**) of the **Penal Code**. The particulars were that on the 16th day of June 2010 at Gitare market, Embu East District within the Embu County, jointly with others not before court, while armed with dangerous weapons to wit a rifle and pangas, robbed Ann Leah Muthoni, of cash Kshs 11,000/=, one identity card, two N.H.I.F cards, a voters card, one Equity bank plate and airtime scratch cards for Safaricom, Zain and Yu companies of different denominations, and at or immediately after the time of such robbery, used actual violence to the said Ann Leah Muthoni.

The 1st appellant also faced an alternative charge of handling stolen property contrary to **section 322(2)** of the Penal Code, the particulars being that on the 2nd day of July 2010 at Irangi village, Embu East District of the Embu County, otherwise than in the course of stealing, dishonestly undertook the retention of a mobile phone make G-Tide serial number 35668002141960, knowing or having reasons to believe it to be a stolen property.

The trial court found the prosecution to have satisfied beyond reasonable doubt the commission of the offence of robbery with violence on the first count as against the 1st and 2nd appellants and sentenced

them to death.

We are alive to our duty as the first appellate court to subject the evidence to fresh scrutiny, weigh conflicting evidence and draw our own independent conclusions, while making allowance for the fact that the trial court had advantage of hearing and seeing the witnesses (See ***Okeno v Republic*** **[1972] EA 32**).

The appellants have raised various grounds of appeal, key among them being their identification. They contended that the trial court erred in failing to put into consideration that no description was given by the complainants PW1, PW2 and PW3 to the police officers who arrived to the scene of the crime immediately after the incidence, that the first report made by the complainants did not support the alleged identification, that the identification parade flouted identification parade rules and further that the trial court relied on uncorroborated and inconsistent prosecution evidence.

The essence of the appellants' case is that they were not properly identified. Before evaluating and reassessing the evidence, we remind ourselves of the need to approach the issue of visual identification with great care and caution. The evidence of identification at night must be tested with the greatest care using the guidelines in ***R v Turnbull*** **[1976] 3 All ER 549** and must be absolutely watertight to justify conviction. **(See *Nzaro v Republic* [1991] KAR 212 and *Kiarie v Republic* [1984] KLR 739**). In the case of ***Maitanyi v Republic*** **[1986] KLR 198, the** Court of Appeal stated that in determining the quality of identification using light at night, it is at least essential to ascertain the nature of the light available, what sort of light, its size and its position relative to the suspect.

The relevant evidence against the appellants in relation to the robbery incident was as follows. PW1, Ann Leah Muthoni owned a shop at Gitare market. On the 16th June 2010 at about 9.00 pm she was inside her shop when a man, 2nd appellant, came in and requested for a cigarette. She told him she did not stock cigarettes. Another man stood behind him. The man produced a panga which he lifted against her while the other man, the 1st appellant, stood by the counter and produced a pistol. She started to scream and dashed to the inner room of her premises when the 2nd appellant followed her and started assaulting her with a jerrican. He cut her on the left hand thumb with the panga, on the left eye and on the back with a gas cylinder. She was with her daughter Sharon at the time. She lay on the floor injured and was later rescued by her brother Peter. On going to the shop, she found her brother Justus lying on the floor and was pronounced dead on arrival at Runyenjes Hospital. PW1's cell phone, a G-Tide, hand bag with identity card, two NHIF cards, Equity ATM cards and air time scratch cards worth Kshs. 5,000/= and cash totaling Kshs. 11,000/= was stolen. She reported the matter at Runyenjes Police Station and treated at St Michael Hospital. PW1 identified the appellants in an identification parade.

PW2, Sharon Grace Wanjiru, PW1's daughter testified that at the material time, she heard her mother scream and when she responded she met a man hitting her mother with a panga. She screamed and was cut on the right hand and head. Her uncle Peter then came in through the back door with a panga. She saw her mother being hit with a jerrican on the back and was cut on the right hand thumb. The thug also took a gas cylinder and hit her mother with it as a result of which she fell down. During the incident, PW2 testified that she was able to identify the 2nd appellant who cut her with the panga and the 1st appellant who stood close to her. The scene was well lit with electricity.

As regards the PW1's G-Tide phone, PW13, Cpl Emmanuel Kiptoo testified that the phone was traced through the Safaricom, the service provider. He traced the 1st appellant at his house on 1st July 2010 at Irangi Village where the phone was recovered. The phone was positively identified by PW1 as her phone by providing a purchase receipt and a casing box. PW2 identified the G-Tide phone as one that PW1 had for the last two years.

In his sworn defence, the 1st appellant, denied the offence and stated that he was a businessman and charged cell phones for customers. He stated that he owned a video shop and rental houses. His testimony was that on 1st July, 2010 at about 2.00 am, he was sleeping when he heard his door hit and he was ordered to open. On opening he was asked about certain Timothy and when he left the premises. He was hit with a metal bar and his wife was kicked on the chest. The people then entered into the shop and

confiscated several phones that were charging, a camera and blow drier. The phones, according to the 1st appellant's testimony belonged to his clients and others his tenants. It was upon arrival at Embu police station that the 1st appellant realized he had been arrested by police officers. His evidence was that the phone was planted on him by the police.

The 2nd appellant gave sworn testimony. He denied committing the offence as on the material day he was at home watching TV with his family. He also testified that the identification parade was not properly conducted. On cross examination, he conceded that he signed the identification parade report to the effect that he was satisfied with the procedure.

It is not in doubt that PW1 was attacked by two men and injured as confirmed by Dr Stephen Maina, PW12 who produced the P3 Form. PW1's property listed in the charge sheet was also stolen. The question, based on the facts, is whether the appellants were identified as having committed the offence of robbery with violence as charged?

According to PW1, she was able to identify the 1st appellant by the ears and the facial features and the 2nd appellant by the beards and the nose. In cross- examination by the 1st appellant, during the trial, PW1 testified that he stood close to the 1st appellant, that the shop was well lit with electricity and saw her face pretty well since she stood close to where PW1 stood behind the counter. In cross examination by the 2nd appellant, PW1 stated that she could identify him as he had unique features, the beards and sharp open nose. PW13, Cpl Emanuel Kiptoo, of the Embu Police Station stated that in cross-examination by the 1st appellant that the complainant, PW1 described him in her statement.

In cross examination, PW2 stated that she clearly saw the appellants. She stood about 2 metres from the 2nd appellant who was cutting her mother and saw his face very well. Regarding the 1st appellant, PW2 had this to say on his identification, *"I wasn't that close with the other man who is you. I stood about 5 metres from you. I saw your face well but your ears were conspicuous as they are unique. The ears have strange shape and an extension."*

It is apparent that both PW1 and PW2 in their testimonies, gave clear evidence of the features of the appellants. PW1 admitted that in her first report to the police she stated that she was attacked by two unknown men. She did not give the description to the police but only stated that she would be able to identify them if she saw them. Likewise PW2 did not give a report of the 1st appellant's features to the police when making the report which she stated were unique. PW13, the investigating officer, stated upon cross-examination by the 1st appellant that PW1 described him in her statement but he did not give particulars of this description.

In ***Maitanyi v Republic (supra)***, this Court held, ***"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".***

We have analysed the evidence of identification and we conclude that the evidence falls short of the kind required to convict the appellants. It was apparent from the witnesses' testimony that no description regarding the appellants' unique features were given in the first police report and indeed subsequent reports. PW1 and PW2 who had contact with the attackers for the longest period during the horrifying ordeal did not provide a description of the attackers immediately after the incident to the police particularly given that they identified unique features which would have been used to identify the appellants. In the circumstances, an identification parade could not be carried out.

We now turn to the 1st appellant's case which merits special consideration as PW1's G-Tide phone was recovered from his house during a search. The phone was positively identified by PW1 and corroborated by other PW2 who had seen her mother with the phone for a period of two years. The finding of the G-

Tide phone belonging to PW1 at the home of the 1st appellant confirms the prosecution case that the 1st appellant was involved in the robbery. His defence that the phone could have belonged to a neighbor or tenant cannot stand scrutiny in view of the evidence of PW9, Joseph Njue Njeru, a businessman who testified that he met the 1st appellant in mid-June 2010 where he did an Mpesa transaction with him. He testified that the 1st appellant had a G-Tide phone which he identified in court and the transaction was recorded on the phone found recovered by the police. Although the phone was recovered about two weeks after the robbery we find that the evidence as a whole satisfies the doctrine of recent possession elucidated in the case of ***Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga v Republic CA Criminal Appeal No. 272 of 2005 (Unreported),*** **where the Court of Appeal held that**,*"….It is trite that before a court of law can rely on the doctrine of recent possession as a basis for 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, secondly that the property is positively the property of the complainant; thirdly, that the property was stolen from the complainant and lastly, 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 property can move from one person to the other."*

In the circumstances we find that the prosecution proved the offence of robbery with violence against the 1st appellant. We therefore affirm the conviction and dismiss his appeal.

As regards the 2nd appellant we find the conviction unsafe in light of the evidence. We therefore allow the appeal and set aside the conviction. The 2nd appellant shall be released unless otherwise lawfully held.

DATED and **DELIVERED** at **EMBU** this 16th December 2013.

D.S. MAJANJA **H.I. ONG'UNDI**

JUDGE **JUDGE**