



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KITALE**

**CRIMINAL APPEAL NO. 148 AND 149 OF 2010**

**JOHN LITALI ALIAS SOLDIER .....}**

**MOSES LONGOLE .....} APPELLANTS**

**VERSUS**

**REPUBLIC..... RESPONDENT**

*(APPEAL ARISING FROM THE DECISION OF HON. D. M. OCHENJA, AG. PM IN KITALE CHIEF  
MAGISTRATE'S COURT IN CRIMINAL CASE NO. 147 OF 2009)*

**J U D G M E N T**

The appellants together with nine others who were acquitted by the Lower Court were charged with robbery with violence contrary to Section 296 (2) of the Penal Code. Particulars are that on the 26th day of May 2007 at Birunda Village in Trans-Nzoia District within Rift Valley Province, jointly with others not before the Court while armed with dangerous weapons namely pangas, axes, rungunus robbed Rachael Juma one mobile phone make Motorola C118, one battery, one radio Serial No. ST 451DEODL and stove all valued at Kshs. 10,000 and at the time of such robbery seriously wounded Rachael Lusike Juma and killed Diana Namukuru Juma.

The appellants were also charged with other offences ranging from rape, grievous harm to assault but were acquitted of all these charges. The two appellants were convicted and sentenced to death for robbery with violence against which they have appealed to this Court.

In brief, the facts leading to the conviction of the appellants were that on the night of 26th May 2007 at around midnight a group of thugs invaded the homestead of Pw 8 Rachael Juma Lusike where they brutally attacked her and killed her daughter Diana Namukuru. The thugs stole a mobile phone make Motorola C118, one battery, one radio and a stove. The thugs then moved to a house within the same compound where they attacked Pw 6 Kennedy Juma who was sharing a room with four other boys namely Pw 1 Richard Chesoni Juma, Pw 2 Samuel Mukanda, Pw 3 Joseph Wafula Samson and Samuel Wanyonyi. The thugs attacked the boys including Pw 6 using pangas. A radio and battery were stolen from the boys' house.

After the thugs left, Pw 2 Samuel Mukanda went and woke up their neighbour Pw 7 Joseph Wanjala Wanyonyi who mobilized neighbours who proceeded to the home of Pw 8 Rachael Juma Lusike where they found her seriously injured. Her daughter Diana Namukuru whom we shall hereinafter refer to as "the deceased" had been killed. The Area Chief was called to the scene. Police Officers were also called and took the injured to hospital. The body of the deceased was taken to Mt. Elgon Hospital Mortuary.

Pw 8 Rachael Juma Lusike was taken to Kitale District Hospital while unconscious. She remained

admitted in hospital for two months. On 27/05/2007 Pw 14 Jomo Geoffrey Mutoka who is Chief of Kiminini Location visited the deceased's home where he talked to the mourners who were present. He pleaded with anyone with information which may lead to the arrest of the deceased's killers to volunteer it. An informer came up and told Pw 14 that one of the suspects was among the mourners. Pw 4 was shown one Peter Abel Kamaisi who was the fourth accused in the case before the Lower Court. He went and interrogated the said suspect Peter Abel Kamaisi who revealed that he was with the first appellant who was the third accused in the proceedings before the Lower Court. Pw 14 was accompanied by three Administration Police Officers. They proceeded to where the first appellant was working. They arrested him. The first appellant led them to his house where an axe, one stove and a blood stained mosquito net were recovered. The first appellant and the other suspect who was 4th accused were then handed to Kitale Police Station together with the recovered exhibits.

On 29th May 2007 at around 1.00 pm, Pw 9 Joseph Togom an Assistant Chief of Laisambu Sub-Location of Kibomet Location was on normal patrol within Huruma area of Kibomet when he received information from an informer who told him that there was a lady in the area who had bought a radio suspected to have been stolen from Birunda area. Pw 9 proceeded to the home of Purity Nakhumicha in company of Administration Police Officers. They interrogated the lady who admitted to having bought a radio from someone she knew. She was arrested and taken to Kitale Police Station where she was booked.

Purity Nakhumicha later became Prosecution witness no. 11 (eleven). She testified that on 27/05/2007 some two people one of whom was the second appellant went to her house seeking to sell a radio. The other person was known to her as he was her customer. The two offered to sell the radio for Kshs. 1,000. She gave them 500 and promised to clear the balance after they gave her a receipt. She testified that as she was being led to the Police Station, she spotted the persons who had sold her the radio. The Area Chief stopped the vehicle and his vigilantes arrested the person. They were both taken to the Police Station but she was later released.

When put on his defence the first appellant John Litala who is a tractor driver stated that he hails from Kakamega. He was working for one Manase. On 25/07/2007 he went and worked briefly before coming back to his house at Kambi Ndizi. On the following day, he went to his workplace where he worked until 6.00 pm. As he was coming back, he met a group of people who told him that they were coming from a funeral. On 29/07/2007 he went to buy a newspaper for his boss. He met one Mulengo who lured him to a certain home where he found many people. He was arrested and taken to his house where a search was carried out but nothing was found. He was thereafter taken to Kitale Police Station where an identification parade was conducted. He was forced to sign some forms after which he was charged for an offence he never committed.

In his defence the second appellant stated that he comes from Lodwar and used to stay at Kibomet. On 30/05/2007 he left Kibomet for Kitale where he sold mats. He returned to his house at 6.00 pm and sat outside listening to his radio. He later saw three people one of whom was handcuffed. The handcuffed man was Eric Simiyu his neighbour. He was asked whether he knew the whereabouts of a person whose house had been locked with a padlock. When he told the three that he did not know about his whereabouts, he was asked to accompany the three. He was taken to Kitale Police Station where he remained until 13/06/2007 when an identification parade was conducted. He was picked out by one Richard Chesoni (Pw 1). On 14/06/2007 he was arraigned in Court together with Eric Simiyu who was accused number eleven in the Lower Court. He was later jointly charged with his other co-accused. He denied committing the offence.

The first appellant raised the following grounds:-

1. *That the Learned Trial Magistrate erred in law and in fact by convicting the appellant as the evidence produced by the witnesses did not irresistibly point to his guilty.*
2. *That the Learned Trial Magistrate erred on law and fact by convicting the appellant on induced and insufficient evidence.*
3. *The Learned Trial Magistrate erred in law and fact by convicting the appellant without prove that*

- the exhibits were found in his possession.*
4. *That the Learned Trial Magistrate erred in law and facts by convicting the appellant without knowing that Chapter 46 of the Force Standing Orders on identification parades were not strictly followed.*
  5. *That the Learned Trial Magistrate misdirected himself on the law of alibi.*

The second appellant raised the following grounds:-

1. *That the Learned Trial Magistrate erred in law and fact by convicting the appellant without proof of possession of the alleged exhibit.*
2. *That the ownership of the premises upon which the alleged radio was recovered from was not established beyond reasonable doubts.*
3. *The Lower Court erred in law and facts by convicting the appellant on contradictory evidence.*
4. *The Lower Court erred in law and facts by convicting the appellant on hearsay evidence.*
5. *That the Learned Trial Magistrate erred in law and fact by convicting the appellant based on an identification parade which was conducted contrary to rules governing identification parades.*
6. *That the Learned Trial Magistrate erred in convicting the appellant without making provision that there could be mistaken identity.*
7. *That the Learned Trial Magistrate erred in dismissing the appellant's defence without sufficient reason.*

The appellant's appeals were opposed by Mr. Onderi for the State who argued that the appellants were found in possession of stolen property for which they did not account. He argued that there was positive identification of the recovered properties and that the Trial Magistrate properly applied the doctrine of recent possession. He contended that the issue of misjoinder was addressed by the Trial Magistrate who found that the misjoinder did not prejudice the appellants and that that is why the appellants never raised it as a ground in their appeals.

As a first appellate Court, our duty is to subject the whole evidence to fresh and exhaustive examination. We have to weigh any conflicting evidence and come to our own conclusions. We however have to give allowance to the fact that we did not see the witnesses testify or hear their evidence. This was what was clearly stated in the case of **Okeno Vs Republic [1972]EA 32.**

We have carefully evaluated the evidence adduced before the trial Court. There is no doubt that a robbery occurred at the home of Pw 8 Rachael Juma Lusike. She was badly injured and remained in hospital for over two months. Her daughter Diana Namukuru was killed in the course of the robbery as confirmed by the post mortem report produced by Pw 10 Dr. Donald Mugoi. Other family members were injured. The P3 form of the complainant and the others who were injured were produced in evidence by the same doctor.

The issue we have to determine in this appeal is whether the two appellants were involved in the robbery. As was said in the case of **Okeno Vs Republic**, the duty of the appellate Court is not to merely scrutinize the evidence to see if there was some evidence to support the Lower Court's findings and conclusions. We have to analyze the evidence afresh and reach our own conclusions.

The robbery herein took place at night around midnight or after midnight. Key witnesses to the robbery include Pw 8 Rachael Juma Lusike. She testified that she was in the process of going to sleep at around 10.00pm when she suddenly saw three people in the bedroom. She stated that she had lit a tin lamp commonly referred in Swahili as "koroboi". It is the light from the tin lamp which enabled her to identify the 5th, 8th and 9th accused persons. She stated that she recognized the 5th and 9th accused persons who were bicycle taxi operators commonly known as "boda boda" and the 8th accused who was her neighbour. There are doubts as to whether Pw 8 actually recognized any of the assailants. She may not have been awake as the time she says she was attacked is not supported by any of the witnesses. All the witnesses say the attack took place after midnight. Even if she were awake, light from the tin lamp would have not have been sufficient to enable her recognize any of the assailants. She had been badly injured and was even said to have been raped but she did not know that she had been raped. She was only told

that she had been raped after she became conscious.

Pw 1, Pw 2, Pw 3 and Pw 6 were sleeping in the same room. Pw 2 Samuel Mukanda was sworn but was unable to testify. He was stood down to enable him gather strength to do so but the record shows that he was never called again. Samuel Wanyonyi who was in the same room was not called as a witness.

The accounts given by Pw 1, Pw 2 and Pw 6 are that when the robbers came into their house, they stood at the bedroom door and ordered them to lie on their stomachs which they did. They were then attacked using pangas. Pw 1 testified that he saw one robber who stood at the door to the bedroom and flashed a torch at them. He testified that he was able to identify 1st accused, 3rd, 6th 7th and 8th accused persons. It is not possible that he would have been able to identify four thugs while one of them was pointing a torch at them and more particularly when lying facing down.

Pw 3 testified that he identified four thugs that is the 1st, 3rd who is the first appellant herein, 8th and 9th accused persons. To this witness, he saw four torches. It is not possible that one could be able to identify four people who had four torches all directed at their victims.

Pw 6 was the older of the five boys who were in the same room. He testified that the thugs had one torch and that he was able to identify the 1st, 3rd accused the first appellant herein and the 6th accused. He testified that the thugs had ordered them to lie down which they did. It is therefore not possible that he would identify any of the robbers in the circumstances.

Pw 4 Rachael Lusike Juma, a granddaughter of Pw 8 who was in the same house with her testified that she was able to identify 5th and 9th accused persons through light from a tin lamp. This was a 10 year old girl and we do not think that in the circumstances she would have been able to identify any of the attackers.

There were identification parades which were conducted in which some witnesses picked out the two appellants. Having found that the conditions under which the robbery occurred were not conducive for a positive identification, the picking out of the suspects was perhaps due to the bitterness which the witnesses had following brutal attack of Pw 8 and the killing of the deceased. We find that the Trial Magistrate rightly declined to go by the evidence of identification during the parade and the alleged identification of some assailants during the robbery.

We now come to the evidence which led to the arrest and conviction of the two appellants. As regards the first appellant John Litale Alias Soldier, there is evidence from Pw 14 Jomo Geoffrey Mutoka Chief of Kiminini Location. This Chief had gone to the home of the deceased on 27/05/2007 and pleaded with anyone with information which may lead to the arrest of those involved in the death of the deceased. An informer volunteered information pointing to one Peter Abel Kamaisi who was the 4th accused in the Lower Court. When the accused was arrested, he implicated first the appellant. The Chief proceeded to where the first appellant was working as a tractor driver. He arrested him and took him to his house where an axe, stove and blood stained mosquito net were recovered. These items were identified as among the ones which were stolen during the robbery. Pw 8 including her relatives in the homestead identified the items as those which were stolen from their home during the robbery. The robbery occurred on the night of 26th May 2007. The three items were recovered a day later at the house of the first appellant. The first appellant could not explain how he came by the stolen properties. He tried to raise an alibi in his defence. He was talking of events of July 2007 when the robbery took place in May 2007. Though he was talking of dates in July, it was clear that he was intent on raising an alibi covering the period when the robbery occurred. This is because he talked of the evening of 26th July 2007 when he was coming from his work place when he met a group of people who told him that they were coming from a funeral. The 26th he was referring to is the 26th May 2007 in the evening when people had learned of the killing of the deceased. The robbery occurred on the early hours of 26th May 2007. The alibi notwithstanding, the first appellant was convicted based on the doctrine of recent possession. It was established that the things had been stolen recently; they were found in the possession of the first appellant i.e. from his house; the same items were positively identified by the victims of the robbery. The appellant failed to offer any explanation as to how he came by them. The Trial Magistrate was correct in

applying the doctrine of recent possession.

As regards the evidence touching on the second appellant, he was arrested in very unclear circumstances. The Trial Magistrate in convicting him relied on the evidence of Pw 11 Purity Nakhumicha. Pw 11 is the one who was found in possession of a radio which had been stolen during the robbery. Pw 11 was arrested by Pw 9 the Assistant Chief of Laisambu Sub-Location who had been tipped by an informer that there was a stolen radio which had been sold to her and was suspected to have been among the items stolen during a robbery at Birunda. The evidence of Pw 9 is that he proceeded there and arrested Pw 11 who admitted to having bought the radio from two people one of whom was her customer. He testified that he took Pw 11 and handed her to Kitale Police Station and he later heard that another suspect had been arrested in connection with the recovered radio.

Pw 11 in her testimony testified that when she was arrested she was put in a vehicle and as she was being taken to the Police, she saw one of the persons who had sold her the radio. The Chief stopped the vehicle and his vigilantes arrested the man whom she described as Ismail who was not in Court. Evidence of this witness (Pw 11) is contrary to that of Pw 9 who categorically said that he only took Pw 11 to the Police Station and that he later learned that another suspect had been arrested in connection with the same radio. It is important to note what Pw 11 said in part:-

*“After two days, the area Chief came and asked me where I had gotten the radio in issue. I told him that I had been sold the same by two people. He further stated that there were so many goods that had been stolen. He ordered me to produce other goods but I told him that I was only sold one radio. I later went out whereof I was ordered to board a vehicle. On the way, I spotted the persons who had sold me the radio. The Area Chief stopped the vehicle and his vigilante did arrest the 10th accused one Ismail who is not in Court”.*

It is clear from the evidence that the person who was arrested by the vigilante of the Chief was one Ismail whom the witness said was not in Court. The second appellant was the 10 accused in the Lower Court and his name is not Ismail. In fact the second appellant was arrested later and was charged together with one Eric Juma Simiyu vide Criminal Case No. 1777 of 2007 which was later consolidated with Criminal Case No. 1723 of 2007. The state later entered a *nolle prosequi* in favour of Eric Juma Simiyu.

It is therefore clear that it is not the second appellant who was arrested on 29/07/2007. The Trial Magistrate in his judgment relied on the evidence of Pw 11 in convicting the second appellant. It is apparent that the Trial Magistrate did not read the record of proceedings properly. He is not the one who heard the evidence of Pw 11. In his judgment he talks of how Pw 11 was arrested by Police Officers and as she was being taken to the Police Station, she spotted the second appellant. She informed Police who arrested and took him to Police. There were no Policeman involved in the arrest of Pw 11 or the second appellant on 29/05/2007 as the Trial Magistrate wrote in his judgment.

We are concerned about the reasoning of the Trial Magistrate as regards the second appellant. He stated thus in his judgment:-

*“Last but not least, there is evidence on record that Pw 11 was sold a radio by the 10th accused and another not before Court. Pw 11 stated that the 10th accused and another not before Court sold her a radio at Kshs 1,000/-. She paid Kshs 500 and promised to clear the balance upon the production of a receipt of the said radio. She was later arrested with the said radio and she told the Police that she had been sold the same by the 10th accused and another not before Court. As she was being escorted to the Police Station to record a statement she spotted the 10th accused on the road. She then alerted the Police who duly arrested the accused (10) and took him to the Police Station. The 10th accused in his defence has been evasive about the issue of the radio”.*

With due respect to the Trial Magistrate, he misapprehended the evidence of Pw 11. There is evidence from the Investigating Officer Pw 12 PC Geroge Amasa who testified that the second appellant was arrested on 30/05/2007 by PC Nyota and PC Tabisu. These two Police Officers were not called to testify on what basis they arrested the second appellant.

Pw 11 was not a truthful witness. When she was being cross-examined by the second appellant, she stated that she saw the appellant for the first time when the appellant allegedly went to her house. She continued to state under cross-examination that when she was arrested, she spotted the 2nd appellant on the road and alerted the Area Chief who arrested him. She claimed further that she was taken together in the 2nd appellant to the Police Station and that on the day of arrest that is 29/05/2007, the appellant was in the company of Ismail who is at large. This is a witness whose evidence should not have been believed. She is a pathological liar. She must have decided to implicate the 2nd appellant to save herself and the said Ismail whom she said was her customer.

The Trial Magistrate was unfair to the second appellant when he remarked in his judgment that the second appellant was evasive in his defence. The second defendant had stated on how he was arrested on 30/05/2007 together with one Eric Simiyu Juma who later benefited from a nolle prosequi entered in his favour. There is nothing in the second appellant's defence which suggests that he was being evasive. It was incumbent on the Prosecution to prove his guilty beyond reasonable doubt. Even though the second appellant gave an unsworn statement in his defence, the Trial Magistrate was obliged to consider it in light of the entire evidence recorded in the proceedings (see **May Vs Republic [1981] KLR 129.**)

The Trial Magistrate should not have applied the doctrine of recent possession to convict the 2nd appellant. There was no proof of possession of the radio by the second appellant. Pw 11 who claims that the second appellant was in the company of one Ismail when they went to her house was not a credible witness. She said in her evidence in Chief that the said Ismail was her customer and that she was seeing the second appellant for the first time. We have no doubt in our mind that Pw 11 bought the radio well knowing that it was stolen. She bought it for just 500. The low price should have made her suspect that it was either stolen or unlawfully obtained. Being in the situation she had found herself in, she was expected to say anything to get herself out of the problem she had found herself in. We find that the conviction and sentence of the second appellant was not safe. We quash the conviction and set aside the sentence. He should be set free forthwith unless otherwise lawfully held.

As for the first appellant John Litale Alias Soldier, we find that his conviction and sentence was proper. His appeal is dismissed.

**Dated, signed and delivered at Kitale on this...5th.. day of December, 2013.**

**J. R. KARANJA**

**JUDGE**

**E. OBAGA**

**JUDGE**

**In the presence of:**

**Appellants:** .....

.....

**Respondent:** .....

**Court Clerk:** .....