REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKAURU

CRIMINAL APPEAL NO.107 OF 2009

LOYALE PENYI …….....……..…. APPELLANT

VERSUS

REPUBLIC …….....……..... RESPONDENT

(An Appeal from original conviction and sentence in Naivasha P.M.CR.C. No.107 of 2009 by Hon. Nduku Njuku, Senior Resident Magistrate dated 31st March, 2009)

JUDGMENT

LOYALE PENYI (appellant) was convicted on three counts of robbery with violence contrary to section 296 (2) Penal Code and sentenced to death, the charges being that on 15th July 2007 at KENRAC Petrol Station, Gilgil, with others not before court while armed with pangas, he and others robbed JOSEPH IRUNGU THONGORO of cash Kshs.15,000/=, a mobile phone make Motorolla C115, all to the total value of Kshs.18,000/= and used actual violence on him.

On the same date and place, they robbed DORCAS WANGUI MWANGI of cash Kshs.25,000/= and a Motorolla T288 mobile phone valued at Kshs.3,000/= and threatened to use violence on her. Again under similar set of circumstances, they robbed SAMUEL MAINA of a mobile phone make NOKIA 2310 valued at Kshs.5600/= and used actual violence on him.

He had been charged with an alternative count of handling stolen property as he was found with a mobile phone make NOKIA 2310 at Mugoiri bar on the same date.

Appellant had denied the offences.

JOSEPH IRUNGU KAGORO (PW1) worked at KENRAC Petrol station as a pump attendant. On 15/07/07 while on duty at about 8.30 p.m., two men came, wishing to buy paraffin but they had no container and sought PW1's assistance. PW1 showed them the canteen where they could buy a jerrican, but it was closed.

Then a Nissan matatu pulled up at the station and PW1 went to attend to it at the diesel pump, before going back to the two men at the paraffin pump. There was a bench, where PW1 sat – suddenly one of the

two men told him that they wanted all the money he had for the day's takings. The man suddenly produced a piece of timber and hit PW1 on the back right side of his head. PW1 screamed and fell down – the other man removed a brand new panga which he had hidden under his coat and threatened to kill him if he didn't keep quiet. Three more men appeared, armed with new pangas – they had been hiding behind a shed – they ransacked PW1 pockets and took away Kshs.15,000/= and his mobile phone.

They ordered him to take them to MAMA MOKORINO (in reference to his workmate), so he led them to her house where they ordered her to give them all the money she had. She did not resist – she had kept the sales money, which she removed from her cupboard and gave them. They also took away her phone. All this time, appellant was seated on the seat and the lights were on. When they were through, they locked the door from outside, leaving the victims inside. The pair shouted for help and neighbours rushed to their rescue.

PW1 went to the police station to make his report, and while there police brought in the appellant whom PW1 was able to identify as one of the robbers.

He was categorical that appellant was among the first two men who had confronted him and is the one who threatened him with a panga after he had been felled by his colleague who had hit him with a piece of timber; and he was also among those that PW1 led to Mkorino's house.

Appellant was brought into the police station with two mobile phones and a new panga – PW1 was able to identify these items in court. He further stated:

"I had not known the accused before but he is the one who ordered me to shut up . . . . At no time were lights put off. The robbers had not covered their faces and I was able to see the accused properly."

During the incident, PW1 sustained an injury and was issued with a P3 form. It was his further evidence that DORCAS (MOKORINO) lost Kshs.25,000/= being money collected as sales earlier in the day and which they had counted and wrapped in a polythene paper.

On cross-examination he stated:

"I saw you during the robbery and when you were brought to the police station. I was able to identify your colleague who was killed by the mob . . . ."

DORCAS WANGUI MWANGI (PW2) also a pump attendant at KENRAC Petrol station told the trial court that on 15/7/2007 at about 8.30 p.m. while in her house within the petrol station, her colleague (PW1) arrived while being held by a stranger who had a panga. She confirmed that two other men entered armed with pangas and they demanded money from her while threatening her with pangas.

She gave them Kshs.25,000/= which was petrol sales – they also demanded her mobile phone, a Motorolla T288 which she gave them. They then locked her and PW1 from outside and they were eventually helped by neighbours who came and opened for them. However she was not able to identify anyone.

Lance Corporal **SAMUEL MAMU** of 20 Parachute Battalion was on his way to KENYATTA Barracks on 25/07/07 when he met five men who were armed with pangas. He was talking on his mobile phone which they snatched, then one of them tried to cut him, but he blocked the blow and was hit on the left hand and also cut slightly on the face. He fled to the barracks and reported to the duty officer. The next day PW3 reported the matter to Gilgil police station and was told that someone had been arrested with two mobile phones – he was able to identify his Nokia 2310 as he had inscribed his service number 74930 in two places at the back cover. He also had a receipt issued to him when he bought the phone – the same were produced as exhibit. It was his evidence that the men had new pangas which were shiny, similar to the one produced in court.

PC ELKALLAN WETACHU (PW4) of Gilgil police station received a report about the robbery at KENRAC Petrol station and rushed to the scene – both PW1 and PW2 told him of their ordeal and losses and said they could identify the robbers who were Turkana tribesmen. A search was mounted for the gang and five men were spotted in town, one who had a panga was lynched by a mob. One had booked a room at Mugoiri bar and restaurant and police officers found a mob which was baying for his blood. The police removed him and recovered from him a Nokia 1600 and Nokia 2310 phones and cash Kshs.8,000/=. He was then taken to the police station where some of the victims identified him as one of the robbers.

He confirmed that on 16/7/08, PW3 reported how he had been robbed the previous evening of his mobile phone Nokia 2310. He was able to identify one of the phones recovered from the appellant as it bore his service number, and he also had a receipt for it. The phone had been off and PW3 activated it in PW4's presence.

On cross-examination PW4 stated that appellant was able to reactivate the other phone Nokia 1600 and it was returned to him plus the Kshs.8000/= because no one claimed having lost such kind of money. He denied the suggestion by appellant that he had recovered the phone from the dead suspect then planted it on the appellant.

DR. MARION MUKIRA (PW5) examined PW1 and PW5 and confirmed that both had injuries whose degree she assessed as harm – she filled and signed the P3 forms which she produced as exhibit.

In his sworn defence, the appellant stated that he had left BARAGOI on 14/7/07, and got to Gilgil on 15/07/07 in the evening. He intended to get to Naivasha, so he decided to sleep in Gilgil and hired a room at about 9.00 p.m. At 11.00 p.m., he heard a knock at his door, police officers came, interrogated him. He had Kshs.8900/= and a Nokia 3100 – he was arrested. At the police station, he complained that the recovered items were his property but nonetheless he was arrested and charged.

In his judgment, the trial magistrate expressed his astonishment at the action of PC Wetachila (PW4) who decided to give back the appellant a phone and money recovered from him simply because he claimed they were his property.

The trial magistrate noted that PW1 was able to identify appellant in relation to the two robbers at the petrol station but that his evidence was uncorroborated and in the 2nd incident, no one saw the appellant and the only link between the appellant and the incident was the recovery of PW3's phone.

The trial magistrate stated:

"There is nothing in law to bar this court to (sic) convict on the basis of one witness, even if that evidence is uncorroborated but the court must satisfy itself that such evidence is striking the truth . . . ."

The trial magistrate found that PW1 was able to properly identify his attacker as he had time to converse with the appellant in the original group of two in a fairly free atmosphere and that he was able to have his face indelibly marked in his mind. He also had another opportunity while inside PW2's house and he held that count I and II were proved as they were committed in the presence of PW1.

He was also satisfied that appellant was found in possession of the phone Nokia 2310 a few hours after PW3 had been robbed of it and he invoked the doctrine of recent possession, saying the circumstances that led to appellant being in possession of the phone met the principles envisaged by this doctrine and the circumstances satisfied all the ingredients of robbery.

The appellant contests the outcome on amended grounds that can be condensed into two:-

1. (a) Conditions for identification were not conclusive.

(b) PW2's evidence contradicted that of PW1 in describing the manner of the attackers dress because

PW2 said they wore hats

(c) No identification parade was conducted

2. No independent witness was summoned from the bar and restaurant where he was arrested. The other grounds listed seem to be a repeat of each other.

In his written submissions, the appellant argues that the trial magistrate failed to acknowledge that the burden of proof placed on the prosecution was not discharged.

The appeal is opposed and Mr. Omwega on behalf of the State submits that the circumstances were favourable for positive identification as the robbers never switched off the lights. Further PW1 had sufficient time with them and he even led them to Dorcas' house. There was evidence of violence.

He also draws to our attention the recovery of a phone belonging to one of the victims almost immediately after the robbery and this sufficiently connected the appellant with the series of robberies which took place that night.

However appellant is adamant that whereas PW1 claimed that the attackers had not covered their faces, PW2 said their faces were covered.

Further that the Investigating Officer (PW4) did not disclose what he recovered from the deceased robber.

On the issue regarding identification, we can do no better than to be guided by considerations set out in the case of **Charles O. Maitany V R** (1986) KLR at pg 198 where Justices Nyarangi, Platt and Gachuhi observed that:

"It is at least essential to ascertain the nature of light available and its position in relation to the suspect. . ."

We note that the nature of the light was not described BUT there was a reference made by PW1 to the extent that when they got to Dorcas' house the lights were not switched off – which seems to suggest that at least there was some source of light available which could illuminate those within the room. The persons who attacked the appellant spent a considerable amount of time with him while at the petrol station where they had purportedly gone to purchase paraffin – then accompanied him to Dorcas' house which she described as being one roomed.

It is true that Dorcas said that the intruders wore hats – which is not a contradiction to what PW1 said because all he said is **"The robbers had not covered their faces and I was able to see the accused properly."**

At no point did Dorcas say that the hats the robbers wore covered their faces. But even if one were to argue that since the source of light referred to was not specified and therefore not conclusive, then we have considered the circumstances in the matter which cannot be termed as coincidences – these are:

(a) The total number of people who attacked PW1 at the petrol station were five in number, all brandishing new pangas – but two seemed to have the lead roles.

(b) This same number and nature of arms was referred to by PW2 (i.e., the two armed men who accompanied PW1 to her room).

(c) PW3 who encountered them separately along the road also referred to five men armed with brand new pangas.

This pattern then leads us to draw a reasonable conclusion that the people who attacked and robbed PW1, were certainly the same ones who attacked and robbed PW2 (after all they were led to her by PW1) and

were the same ones who attacked and robbed PW3 – there can be no other reasonable hypothesis.

We wonder what purpose an identification parade could have served when from the evidence of PW1 it is apparent that while he was making his report at the police station, the appellant was brought to the station by police and he identified him as one of the robbers. Having already seen the appellant as he was being herded to the station then surely any purported subsequent identification parade would have been a flawed process.

This was not just a situation of circumstantial evidence, there was the application of the doctrine of recent possession which in our view was so aptly invoked by the trial magistrate stemming from recovery of PW3's property identified phone from the appellant and he could not give any reasonable account as to how he came to be in possession of an item which had just been robbed off the owner shortly before recovery. We find no fault on the part of the trial magistrate

The victims (PW1 and PW2) told the trial magistrate how they sustained injuries in the course of the robberies and indeed P3 forms confirming that were produced by PW5. We are satisfied that from the evidence presented, all the ingredient of robbery with violence were proved and the trial magistrate properly indisposed the evidence and arrived at a proper finding. The conviction was thus safe and we uphold it.

On the question of sentence, we find that there were no extraneous facts such as serious injury upon PW1 which could support the imposition of the death penalty. We would therefore set aside the death sentence upon the appellant and substitute therefore with fifteen years imprisonment to commence from the time of conviction and sentence by the lower court. The upshot is that the appeal is dismissed.

Delivered and dated this 10th day of February, 2012 at Nakuru.

ANYARA EMUKULE **H.A. OMONDI**
JUDGE **JUDGE**