REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL 406 & 403 OF 2010

CHARLES MAINA MACHARIA……....1ST APPELLANT

STEPHEN MUIYA KARANJA……...……....2ND APPELLANT

VERSUS

REPUBLIC…….……...……..RESPONDENT

(From original conviction and sentence in Criminal Case No. 1123 of 2010 of the Principal Magistrate's Court at Nyahururu – A.B. MONGARE, SRM)

JUDGMENT

Charles Maina Macharia (1st appellant) and Stephen Muhia Karanja (2nd appellant) were jointly charged with the offence of robbery with violence contrary to **Section 296(2)** of the **Penal Code** before A. B. Mongare, Senior Resident Magistrate, Nyahururu, in CRC 1123/2010. It was alleged that on 26/4/2010 at Wanjohi Trading Centre in Kipiriri District, Central Province, jointly with another not before the court, while armed with offensive weapons i.e. clubs (*rungus)* and metal bars, robbed Moses Njoroge Kungu of two mobile phones, make Nokia 11203 and G-tide, a torch and cash Kshs.2,500/- all worth Kshs.9,300/- and immediately before the said robbery, wounded the said Moses Njoroge Kungu. The appellants denied the offence, and the matter proceeded to full trial. The prosecution called a total of six (6) witnesses while the appellants gave unsworn statements in their defence and called one witness. After the trial the court found both the appellants guilty of a lesser offence of handling stolen property contrary to **Section 322(2)** of the **Penal Code** and each was sentenced to 7 years imprisonment. They are aggrieved by the conviction and sentence and preferred Criminal Appeal No. 403/2010 and 406/2010. The two appeals were consolidated to proceed as Criminal Appeal No. 406/2010. The grounds upon which the appeal was preferred are as summarized:-

1. **That the prosecution failed to call material witnesses;**

2. **That the evidence by the prosecution witnesses was contradictory;**

3. **That the trial magistrate shifted the burden of proof onto the appellants;**

4. **That the appellants' defence were not considered.**

Mr. Omari, learned Counsel for the State opposed the appeals for reasons that the trial court found that

the appellants were in possession of goods that had been stolen during a robbery on the same day.

The brief facts of the case before the trial court are as follows;

Moses Njoroge Kungu, PW1 and PW2, Margaret Wanjiku were asleep in their house at Wanjohi in Kipipiri on 26/4/2010 at about 3.00 a.m. There was a bang on the door, then the door was violently broken and robbers entered. They had torches and demanded money.

They hit PW1 on the head and PW2 told them to be patient as she would give them money. The 1st Appellant got Kshs.2,500 from where PW2 had kept it but other robbers demanded more. PW1 said he was able to see the robbers as they negotiated with them. They continued to threaten PW1 asking for more money. PW1 said he was able to see the robbers well as one used to work for him. They also took PW1's Nokia and PW2's mobile too. They locked PW1 and 2's house from the outside and warned them not to raise alarm. After a few minutes, PW1 and 2 heard their neighbours screaming and the people going to rescue their neighbours passed by their house and opened for them. They all decided to pursue the robbers. The next day, PW1's neighbour told him to go to Rironi Police Administration Camp where he was informed some suspects were arrested and his mobile, torch, cash had been recovered. PW1 identified the 1st Appellant as a person he knew well because he had been married to his sister. PW1 said that he also saw the second robber well. PW1 was issued with a P3 form because of the injuries he sustained during the robbery. PW2 also said that she was able to see the robbers well when they flashed torches at her husband. Both PW1 and 2 only learnt of the robber's arrest.

PW3, Peter Muchiri Kungu is a brother to PW1. He was asleep in his house on 26/4/2010 when dogs started to bark at his brother's

home. He called both PW1 and 2's cell phones but they were off air. He climbed through the window of his house, hid himself outside

and watched the suspects were being chased by dogs and they had a powerful torch. PW3 said that there was also moonlight and he saw one person carrying a bag. One wore a white jacket, one a black one and both had black trousers. He telephoned another brother to come to them and on his way to the brother's house, he heard a loud bhang at the neighbour's house. Screams followed. He went on to PW1's house and learnt that they had already been robbed. They pursued the robbers. They boarded a matatu and described the suspects to the driver. At Rironi, the driver spotted the suspects. PW3 disguised himself by covering himself with a *khanga* so that they could not notice him. He also sent for Administrative Police Officers. When they reached the suspects, PW3 was able to identify them and he called police who came and assisted to arrest them. PW4, Pastor Elijah Nganga said he received a call on 26/4/2010 at about 3.00 a.m. the caller asked him to join them to pursue the robbers. The robbers were described to him. About 10 people assembled and divided themselves into groups. He went with Peter Muchiri to Miharate but did not get the robbers. They boarded a vehicle to Rironi and the driver informed them that they had seen people who fitted the description that the witnesses had given. They alighted and started to follow the people on foot. PW4 in company of PW3 arrested the suspects and in the bag which the robbers had, were a mobile phone, a wallet, 3 torches, bunch of keys and a pair of trousers. PW4 said that PW3 had described the suspects before arrest. PW5 APC Joseph Kiriungi Wambugu of Rironi Administration Police Post said that on 26/4/2010, PW1 went to report a robbery that had occurred, the previous night. In the company of PC Peter Murimi, they went to the scene where the suspects had been seen and re-arrested them and recovered Kshs.2,500, Nokia phone 1230 and a screw driver from Stephen (2nd Appellant) while the 1st Appellant had a pair of pliers and keys. When at the police station, the complainant was called and identified his property which had been stolen in the presence of complainants.

The investigating officer in this matter is PW6 – PC 51186 Moses Murage, who recalled that on 26/4/2010, the suspects were taken to the police station where he recorded the exhibits recovered from them. He issued PW1 with a P3 form and the complainant also positively identified the recovered items. P.C. Murage visited the scene where he recovered the stone which was used to break the complainant's door.

PW7, Peter Nginyo of Ol'Kalou General Hospital examined Moses Kungu who had been assaulted. He found the complainant was injured on the back of his head which was tender and opined that a blunt object caused the injury.

When called upon to defend himself, the 1st Appellant said that on 24/4/2010, he received a call from his friend who lives in Kipipiri. The friend informed him that vegetables were ready for sale. The 1st appellant sells vegetables in Nakuru. He proceeded to the friend's farm on 25/4/2010. From the farm, he went with his friend to Wanjohi Centre to take tea. He met his brother in law at the said centre. He had lent the brother-in-law money and the brother-in-law had failed to pay him back. He agreed to pay him the next day. The next morning while at the stage, the brother-in-law came with an Administration Police Officer who interrogated him and arrested him together with his friend.

The 2nd Appellant said he is a farmer at Njogu. He recalled calling his friend, Mama Macharia to go and get vegetables. They went to the farm on 25/4/2010 and from there, passed by Wanjohi Centre. While taking tea, somebody came and went with the 1st Appellant outside and there was a heated exchange. The 1st Appellant identified the person as his brother-in-law. While at the stage, they were arrested. DW3, Ruth Wangeci Muhia, the wife of the 2nd appellant recalled that on 24/4/2010, her husband called a prospective vegetable buyer. The 2nd Appellant went to get a birth certificate for the child and she heard he was arrested.

As the first appellate court, we are required to re-evaluate all the evidence afresh and arrive at our own conclusions bearing in mind that we did not have occasion to see the witnesses and assess their demeanor. PW1 and 2 were robbed at about 3.00 a.m. PW3 saw the robbers after they attacked PW1 and 2 at about 3.00 a.m. There is overwhelming evidence that the robbers were pursued. PW3 and 4 were part of the group that pursued the robbers on the same night. PW4 said that the robbers were described to him by PW3 who claimed to have seen them from his hiding place in his home. PW3 and 4 were present when the robbers were stopped and arrested. PW5 searched the suspects in the presence of PW3 and 4. They saw what was recovered from the bag that the suspects had. PW5 said that the 1st Appellant was found with five keys, a torch and pliers while the 2nd appellant had cash Ksh.2,500, Nokia phone 1203 and screw driver.

On the same morning at about 6.00 am/7.00 am, PW1 identified the Nokia phone recovered by activating the PIN. He also identified the torch which both PW1 and 2 described as having had one defective bulb. The Kshs.2,500 taken from PW1 was also recovered. The other items recovered on the suspects like pliers and screw driver must have been the Appellants' tools. We are satisfied beyond any doubt that the items stolen from PW1 and 2 on 26/4/2010 were recovered early the next morning. PW5 said that the robbery was reported on 26/4/2010 at 7.00 a.m. We are satisfied that the complainant's properties were recovered from the Appellants a few hours after the robbery.

PW1 was assaulted during the robbery. The evidence of PW2 and PW7 confirmed that fact. The question is whether it is the Appellants who took part in the robbery. Although PW1 and 2 claim that they were able to recognize the 1st Appellant as a person they knew and who had married PW1's sister, we find that the circumstances under which PW1 and PW2 were robbed were not conducive to proper identification. Both of them said that the robbers had torches which they shone at them. It is common knowledge that if a torch is flashed at one's face, they cannot be able to see or see the person flashing it.

PW1 said that he saw the face of the robbers as they negotiated with PW2. PW2 was not exactly clear how she was able to see the faces of the robbers. PW1 said that he also recognized the 1st Appellant's voice because he used to work for him. He did not lay any basis for believing that it was the 1st Appellant's voice and we are not able to place any reliance on that evidence. From cross examination of PW1 and 2, it was evident that PW1 and 2 never mentioned that they had seen and identified any of the robbers. We doubt that they were able to identify the robbers under those difficult circumstances.

It is PW3 who saw the robbers well from his hiding place. He said there was moonlight. He described the

robbers to PW4 who accompanied him in the search for the robbers and ultimately, to the arrest the Appellants. We are satisfied beyond any doubt that PW3 was able to see the robbers. To corroborate PW3's evidence was the recovery of the stolen items from the appellants by PW5. The property that had been stolen hardly four (4) hours earlier was found in the possession of the two suspects who were arrested early on the same morning. We find that the recovery of the Nokia mobile which was positively identified by PW1 and 2, the cash and the torch directly connect the appellants with the offence.

The 1st Appellant, claims to have been framed with these charges because PW1 owed him money and refused to pay. The 1st Appellant had the opportunity to cross examine PW1 and 2. At no time did he ever allege or put it to PW1 that PW1 owed him money and he had refused to pay. The allegation that PW1 had a grudge with him over money or because he had separated with PW1's sister is an afterthought and we reject it as untrue. The 2nd Appellant denied knowing the complainants. There would have been no good reason for all the witnesses, PW1 to 6, to frame or implicate him in the offence. We decline to believe his version of the events leading to his arrest. We find that he was one of the robbers.

Violence was visited on PW1. PW1 was examined by PW7 who confirmed that PW1 was injured on the back of the head. Both PW1 and 2 saw the robbers armed with a club *(rungu)* and we are therefore satisfied from the totality of the evidence before us, that an offence of robbery with violence under **Section 296(2) of the Penal Code** was committed.

In **Muremi Ngumbao Mangi Vs Republic – Criminal Appeal No. 141 of 2005**, the Court of Appeal considered what constitutes an offence of robbery with violence under **Section 296 (2) of the Penal Code**. The court said;

"As already stated, there are three ingredients, any of which is sufficient to constitute the offence of robbery with violence under Section 296(2) of the Penal Code. If the offender is issued with any dangerous or offensive weapon or instrument, that would be sufficient to constitute the offence. Secondly, if one is in company with more that one or more other person or persons, that would evidence the offence too. And lastly, 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 that would be yet another set to constitute the offence..."

We are satisfied that the evidence before the court satisfies the above requirements. The appellants were two, they were armed, they used violence on PW1.

The trial court convicted the Appellants on an offence of handling stolen property contrary to **Section 322 (2)** of the **Penal Code**. The trial court did not justify why it decided to reduce the charge. As pointed out earlier in this judgment, the Appellants were found with property that had just been stolen in a robbery. The Court of Appeal in **Isaac Nganga Kahiga *alias* Peter Njenga Nganga Kahiga Vs Republic Criminal Appeal No. 272 of 2005**, laid down what must be established before a conviction can be based on the doctrine of recent possession. The court stated;

"It is trite law that before a court of law can rely on the doctrine of recent possession as a basis of 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, and secondly, that the property is positively be property of the complainant, thirdly, 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 properties can move from one person to another. In order to prove possession, there must be acceptable evidence as to search of the suspect; and recovery of the alleged property; and in our view any discredited evident on the same cannot suffice no matter how many witnesses."

There was overwhelming evidence from PW3, 4 and 5 that after arrest, PW5 searched the Appellants and recovered cash Kshs.2,500, Nokia 1203 and a torch, all items identified by Pw1. We have no doubt that the property was found in possession of the Appellants a few hours after the robbery and they did not give any plausible explanation as to how they came to be in possession thereof.

The Appellants took issue with the fact that the prosecution witnesses were from one family and their friends. There is no law that bars relatives or friends from testifying in any case provided they are competent and have evidence relevant to the case. If a relative or friend is the only witness to an event, he cannot be barred from testifying. PW2, PW3 and 4 are competent and compellable witnesses and their evidence was admissible.

On the allegation that the prosecution failed to call material witnesses the appellants did not support that contention and it remain a mere allegation.

Although we have found that the evidence on record discloses an offence of robbery with violence, the trial court convicted the appellants on a lesser charge of handling stolen property contrary to **Section 322(2)** of the **Penal Code**. The appellants were not warned of the possibility of this court making a finding on the more serious offence of robbery with violence. If this court were to substitute the conviction with one of robbery with violence, it would be prejudicial to the appellants. For that reason, we uphold the conviction on the offence of handling stolen property contrary to **Section 322(2)** of the **Penal Code**. Taking into account all the circumstances of the case we hereby invoke the provisions of **Section 354(3)(ii)** of the **Criminal Procedure Code,** enhance the sentence and substitute the 7 years with 12 years imprisonment each. The sentence will run from the date the appellants were sentenced by the trial court on 1/12/2010. It is so ordered.

DATED and **DELIVERED** this 16th day of May, 2012.

R. P. V. WENDOH
JUDGE

W. OUKO
JUDGE

PRESENT:

Mr. Nyakundi for State

Both appellants – in person

Court Clerk – Kennedy Oguma