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Criminal Appeal 285 & 286 of 2010

JOHN KASYIMA KAKITI

JOHN MWENDO KATIWA …….....……APPELLANTS

VERSUS

REPUBLIC……..RESPONDENT

(Being an appeal from the original conviction and sentence in Kitui Principal Magistrate's Court Criminal Case number 1308/04 by E. Juma – SRM on13.10.2010)

JUDGEMENT

The appellants were jointly charged with the main count of Robbery with Violence contrary to Section 296(2) of the Penal Code before the Principal Magistrate's Court at Kitui. The particulars of the offence were that the appellants on the night of 11th December, 2009 at about 8.00 p.m. at Katengo village, Syomunyu sub location, Kanyangi location in Kitui District, while armed with pangas and whips robbed **Kataa Munyilo,** one pressure stove and one table clock all valued at Kshs. 2000/= and at or immediately

before or immediately after the time of such robbery used actual violence to the said **Kataa Munyilo.**

The 1st appellant also faced an alternative count of handling stolen goods contrary to Section 322(2) of the Penal Code in that on the 13th December, 2009 at around 7.30a.m at Kavoo village, Mandongoi sub location, Kanyangi location in Kitui district within Eastern province otherwise that in the course of stealing dishonestly retained one pressure stove and one table clock all valued at Kshs 2,000/= knowing or having reason to believe them to be stolen goods, the property of Kataa Munyilo.

The appellants both entered a plea of not guilty and they were subsequently tried. During the trial, the 1st appellant was the 2nd accused whereas the 2nd appellant was the 1st accused. The prosecution called in total 7 witnesses in support of their case.

This case in brief was that on 11th December, 2009 at about 8.00 p.m PW 1, **Kataa Munyile** "*the complainant*" was in her house with her grandchild PW 7, **Alice Mutindi Margaret** when they heard a knock at the door. PW 7 answered the door and when she opened, she saw 3 men. She recognized the 2nd appellant among them. The 2nd appellant was in fact an employee of PW 7's aunt, **Alice Kalungu**. As she talked to the men, the complainant also stepped outside and was accosted by those men. She also recognized the 2 appellant among them. She confirmed too that 2nd appellant was an employee of her son. In fact he had worked for him for about 3 months. She also identified the 1st appellant at the scene. The 2nd appellant went on to alert the rest of the trio that the complainant was the lady of the home. The appellants then pushed her into the house and since the kitchen lamp was on it helped her to recognize and or identify the appellants more. Once inside the house, they demanded from her a padlock, iron box and a stove. In the trio, the 1st appellant held her by the neck from the back. The 3rd member of the 1st appellant's team wore a mask over his face. These witnesses could not therefore recognize nor identify him. Nonetheless each one of them had a panga. The complainant had only a stove among the items demanded. She fetched it under her bed and gave them. The robbers continued to ransack the house and in the process stole a table clock. They remained in the house for 20 minutes after which they turned off the lamp and
left.

Besides being armed with a panga, the 3rd unidentified man was armed with a whip which he abandoned at the scene. The complainant and PW 7 raised alarm and PW 2, **Semu Mbithi** and PW5, **Thomas Nzulu Kiwali** answered their distress call. PW 5 was the first to rush towards the house and as he did so he saw 3 people running away from the home of the complainant. He pursued them while calling for help and he managed to subdue one of them who turned out to be the 2nd appellant. The other 2 however managed to make good their escape. Apparently these robbers were looking for old coins and also old lamps which were in vogue and princely at the time. Upon arrest, the 2nd appellant was taken back to the scene of crime. On being interrogated by PW 2, PW 3, **Bernard Mutuku Musyoki** a friend of the complainant's son, he led them to the house of the 1st appellant whom they arrested and recovered the stove and table clock which were positively identified by the complainant and PW 7.

PW 5, **Thomas Nzulu Kiwali** the village elderreceived the 2nd appellant after he was arrested by members of public and he handed him over to the police officers at Itoleka police station together with the recovered panga and whip.

PW6, the investigating officer **P.C Karanja**, received the 2nd appellant from PW5. He rearrested him. On 13th December, 2009 the same members of public escorted the 1st appellant to his office who again he rearrested. He also took possession of the exhibits. Later, the complainant was issued with a P3 form. He was examined by PW 4, **Peter Wambua**, a clinical officer at Kitui District Hospital. He assessed the degree of injury suffered as harm. Following further investigations, PW 6 charged both appellants with the offences.

The two appellants when placed on their defence each opted to give unsworn statement and called no witnesses. They both denied the offence.

The 2nd appellant stated that he was returning to the home of his employer after delivering food to his family when he was accosted by PW 2 who arrested him for allegedly robbing PW1. He was later handed over to police. He maintained that he was a stranger to the offence.

The 1st appellant on his part also denied being involved in the offences. He had been arrested from his farm on which he had been working continuously in the last 2 days. His defence was that the stove and table clock allegedly recovered from him were planted on him. Essentially he pleaded alibi.

The learned Magistrate having carefully considered the evidence adduced by both the prosecution and the appellants in their defence, was persuaded that the appellants were guilty as charged. Accordingly, she convicted them and sentenced each one of them to death as required by law.

The appellants were aggrieved by both conviction and sentence. They separately and individually filed appeals to this court which were consolidated when the appellants appeared for the hearing of their respective appeals on the first occasion on 9th March, 2012. The common grounds of appeal raised are that the evidence of identification by recognition was not watertight, evidence relied on to find the conviction was hearsay and contradictory, and finally their defences were not given due consideration.

The appellants with our permission canvassed the appeals by way of written submissions. We have read and carefully considered the written submissions filed by each appellant.

In response, **Mr. Mwenda,** Learned State Counsel, opposed the appeals and argued that the trial magistrate directed herself to the fact that there was a bright lamp in the house during the robbery. There was also moonlight outside. The robbers stayed with the complainant for about 20 minutes which afforded the complainant ample time to observe the robbers. The appellants were well known to the complainant. The appellants were therefore recognized as opposed to mere identification. Further, the stolen items were recovered from the house of the 2nd appellant a day after the robbery. On the basis of the foregoing he pleaded with us to find that the conviction of the appellants was safe and just. The appeals ought therefore to go dismissed.

It is now our duty as the first appellate court to re-appraise and evaluate the evidence afresh with a view to reaching our own decision in the matter, bearing in mind however that we do not have the benefit of seeing and hearing the witnesses. That was a preserve of the trial court. The duty of a first appellate court has been stated over and over again since the case of **Pandya vs Republic [1957] E.A 336**, and a restated in **Okeno vs Republic [1972] EA 32** and **Kariuki Karanja vs Republic [1986] KLR 190**. That duty was clearly set out in the **Pandya case** *(above).* This court is thus expected, not merely to gloss over the evidence, but to rehear the case and reconsider the materials placed before the trial court with such other materials as it may decide to admit. In this case, we have heard submissions from learned State Counsel and from each of the appellants. We also have the judgment of the trial court which we have carefully weighed and considered; including the impressions made on the trial court by each of the prosecution witnesses and each of the appellants. We are duly guided by these principles in deciding this appeal.

From the evidence and the submissions, we find that the conviction of the appellants is founded on recognition, visual identification and on the doctrine of recent possession. We also find that it revolves around the evidence of two identifying witnesses, the complainant and PW 5 who was with the complainant on the night of the attack. We are aware that the offence was committed at about 8.00p.m. in the house of the complainant thereby brining into focus what assisted these witnesses to identify and or recognize the appellants.

The law relating to recognition/identification has been the subject of many decisions both by the Kenya Court of Appeal (K) and the Court of Appeal for Eastern Africa. In **Karanja vs Republic [2004] 2 KLR**, the Court of Appeal had this to say on the issue:

"The law as regards identification under difficult conditions is now well settled. In the case of Cleophas Otieno Wamunga vs Republic – Court of Appeal Criminal Appeal Number 20 of 1989 at Kisumu this court statetd as follows:

"We now turn to the more troublesome part of this appeal, namely the appellant's conviction on counts 1 and 2 charging him with the robbery of Indakwa (*PW1*) and Lilian Adhiambo Wagude (PW 3). Both these witnesses testified that they recognized the appellant among the robbers who attacked and robbed them… What we have to decide now is whether that evidence was reliable and free from possibility of error so as to found a secure basis for the conviction of the appellant. Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever a case against a defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleged to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification. The way to approach the evidence of visual identification was succinctly stated by Lord Widgery .J in the well known case of Turnbull vs Republic [1976] 2 All ER 549 at page 552 where he said:

"Recognition may be more reliable that the identification of a stranger; but even when the witness is purporting to recognize someone he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."

In the instant case, there is no dispute at all that the 2nd appellant was well known to both the complainant and PW7. He was an employee of the complainant's son and wife. He had worked for them for about 3 months. The 2nd appellant admits that much. According to these witnesses, the appellants knocked on the door of their house. PW7 went to open for them. When she did so, the appellants apparently engaged her in discussion. They told her that they were headed to a home of a certain lady to get some items. According to the PW 7, there was moonlight outside and a lit lamp inside the house. This enabled her to see the 3 robbers and recognize the 2nd appellant among them. This far we can comfortable say that the conditions obtaining were favourable for this witness to recognize the 2nd appellant whom she already knew. The appellant and his colleagues were cordial and comrade like. There were no threats of violence at all that would perhaps have caused this witness to panic and fail to focus and recognize the 2nd appellants in the team. This witness had gone to open the door to whoever had knocked. It must be taken that when she opened the appellants, were at the door steps. Based on this, the witness must have been very close to them. Given the light from the house and the moonlight outside the witness will not have had any difficulties in seeing and recognizing the 2nd appellant. There is also evidence that as she talked to the appellants, the complainant came forth, the appellant's' cohort who escaped the dragnet asked the appellants whether she was the witness's grandmother and the 2nd appellant confirmed as much. This evidence confirms the fact that the 2nd appellant knew the complainant and the witness very well. That can only mean that 2nd appellant was very familiar to the witnesses.

The issue is then whether there was sufficient light to enable PW 7 recognize the 2nd appellant. In the case of **Maitanyi vs Republic [1986] KLR 198**, the Kenya Court of Appeal observed that in circumstances such as those prevailing in the instant case, the trial court is expected to carry out an enquiry as to the intensity of the light and where the light is from a lamp the position of such a lamp – vis-à-vis the accused. In the instant case, we are satisfied that PW 7's description of the light that was available on the night of the attack was informed by the fact that this was going to be an issue during the trial. Although the trial court did not say anything about the light, we ourselves have reconsidered the circumstances and the evidence of PW 7 and we are satisfied that the moonlight as well as the light in the house was sufficient to enable PW 7 to recognize the 2nd appellants. In any event this was a case of recognition as opposed to visual identification of the 2nd appellant. That being the case, and as stated said in the case of **Anjononi vs Republic [1980] KLR 59.**

"…recognition of an assailant is more satisfactory, more assuring and more reliable than

identification of a stranger because it depends upon personal knowledge of the assailant in some form or other."

In the instant case, PW 7 had personal knowledge of the 2nd appellant who was an employee in the family. In the premises her recognition of the 2nd appellant cannot be faulted. Apparently he was not even disguised to make his recognition difficult. In then walked the complainant. As PW7 was talking to the appellants, the complainant rose from where she was sitting and took a step forward. She immediately saw and recognized the 2nd appellant. Apparently on seeing her, the 2nd appellant remarked that she was a lady of the house. This remark again confirms that the 2nd appellant was familiar with the complainant. It is then that the appellants pushed her into the house which was lit with kitchen lamp. This helped her recognize the 2nd appellant once more. According to her, the lamp was placed on the table and remained lit for the 20 minutes that the appellants and their cohort remained in the house with the complainant. The trio only put it off when they left the house after executing their mission. 20 minutes is a long time for someone who is well known to a witness not to be recognized when there was light throughout and such person has not taken steps to disguise himself. Among the trio, it was only the one who escaped and was never arrested who wore a mask. It does appear from the complainant's evidence that the violence visited on her was not much. Indeed they even allowed her to fetch the stove underneath her bed.

The trio also ransacked the house when they did not find an iron box. It is not suggested in the evidence on record that as they were doing this they had forced the complainant into a place where she could not see them nor had they covered her eyes. If they used the kitchen lamp to ransack the house and there is no other suggestion, then the lamp must have been emitting sufficient light to enable them see around the house. Such light would have equally enabled the complainant to see and recognize the 2nd appellant. Indeed it is the complainant's evidence that she was standing next to them as they used her lamp to move up and down her house in search of the padlock and iron box. Finally, on the question of recognition of the 2nd appellant, there is no evidence of any grudge between the complainant and PW 7 as would have propelled them to falsely testify against the 2nd appellants.

Besides the 2nd appellant being recognized at the scene of crime by the complainant and PW 7, there is also the evidence of PW2 who chased and arrested the 2nd appellant immediately after the incident. As the robbery was in the offing, PW 7 managed to escape and ran to the neighbor, PW2 whom he informed that the complainant had been accosted by thugs. PW 2 immediately rushed to the rescue of the complainant. However, as he approached the house, he met with people running away from the house and decided to give chase as he suspected them to be the robbers. He managed to arrest and subdue the 2nd appellant. He had in his possession a panga and a basket. However, the 2nd appellant disputes the alleged chase and arrest. He submits that if ever there was such chase and arrest, then there was a break in the chain link. He does not point out what was that broke the link. He is content to allude to the contradictions in the evidence as to what he was arrested with, whether it was a panga, basket or both. In our view, such contradictions do not amount to a break in the links.

Evidence of a chase and subsequent arrest of an accused is good evidence upon which a conviction can be founded provided that there is no break in chain link during the chase and arrest of the accused. We do not discern such break in this case. According to the testimony of PW 2, he chased and arrested the 2nd appellant hardly 400 meters from the complainant's house. This is a very short distance indeed. There is no evidence that during the chase, the 2nd appellant disappeared from the radar of the PW2. That is the only way that there could have been a break in the chain link. According to his evidence, it was about 8 p.m. when he was chasing the 2nd appellant. It was therefore at night. How then was PW2 able to see the 2nd appellant as he chased him? We think that the answer lies in the evidence of PW7. She stated that there was moonlight. In our view, this might have helped PW2 to see and chase the 2nd appellant. We are therefore satisfied just like the trial magistrate with the evidence of chase and eventual arrest of the 2nd appellant by the PW2.

The appellant in cross-examination of PW 2 raised the issue of a grudge between him and PW 2 over the

latter's sexual advances to his wife and that PW2's cows had damaged his crops. We are satisfied based on the answers given by PW2 in response that indeed there was no such grudge. The allegation was a mere red herring. We are comforted in this conclusion by the fact that he never revisited the issue in his unsworn statement of defence. It is also instructive that upon interrogation, he led to the arrest of the 1st appellant from whose house the stolen items were recovered. It cannot be a mere coincidence. However, this evidence ought to be treated cautiously and with a lot of circumspection knowing that the appellants were co-accused in trial. Even if we were to accept that indeed there was such grudge, the witness is not the complainant.

Further, we cannot see how he would have caused the complainant to be robbed of her items in the process be assaulted and arrange for the same to be recovered in the possession of the 1st appellant all in the name of framing the 2nd appellant with the case.

The second appellant's defence was one of alibi. Upon evaluating the said defence, we have come to the conclusion that the same did not at all challenge the cogent evidence that was lined up against the 2nd appellant by the prosecution. His conviction can thus not be faulted.

We now turn our glare on the 1st appellant. It was alleged that he was among the robbers. Indeed he was among those chased by PW 2. However, he managed to make good his escape. According to the complainant she had not known the 1st appellant prior to this incident. However, he entered the house while it was well lit. The robbery too took long and that gave her sufficient time to identify him given that he was not disguised at all. Indeed, he was the one who demanded a padlock, stove and iron box from the complainant. It is only this witness who identified the 1st appellant. PW7 did not. Thus the identification of this appellant was by a single witness. The law is settled that the evidence of identification by a single witness in difficult circumstances must be tested with greatest care and circumspection and can only form the basis for a conviction if it is absolutely watertight. See **Abdalla bin Wendo** & **another vs Republic [1953] 20 EACA 166; Roria vs Republic vs Republic [1969] E.A 583** and **Karanja & another vs Republic [2000] 2 KLR 140**. Caution by the court is necessary because it is accepted that mistakes of identification of even close relatives or friends are sometimes made. Much as the learned magistrate did not warn herself of the dangers of convicting the appellant on the evidence of a single identifying witness as required, that omission is ameliorated by the fact that there was other evidence which linked the 1st appellant to the crime. This is the evidence of recovery of stolen items on him so soon after the robbery.

Having carefully weighed the evidence of identification, we are satisfied that the 1st appellant's conviction on that basis cannot be faulted. Complainant first saw the 1st appellant at the door step. He then entered the house which was well lit with a table lamp. He is the one who demanded from her the padlock, iron box and stove. He is the one who at some point held her by the neck from the back. He was in the house for 20 minutes in close proximity with the complainant as they ransacked the house for valuables. The complainant had no grudge against him nor was he disguised as to make it impossible to be identified. There is no evidence that the complainant was in shock as to inhibit her sense of identification nor was there any grudge

In our considered view therefore, the evidence of the complaint against each of the appellants was beyond reproach. There is also the additional evidence of recovery of both the stolen stove and the table clock from this appellant so that even if the evidence of identification was weak, this evidence goes a long way in buttressing the evidence of identification by the complainant. In other words, we are saying that the learned magistrate was right in convicting the 1st appellant on the doctrine of recent possession. The robbery at the complainant's house took place at about 8 p.m. on 11th December, 2009. On 13th December, 2009 the 1st appellant was arrested while in possession of the stove and table clock which had been stolen from the complainant during the robbery. In the case of **Andrea Obonyo and others – versus- Republic (1962) E.A. 542**, the Court of Appeal observed

"…It is settled in law, that evidence of recent possession, is circumstantial evidence which depending on the facts of each case may support any charge however penal."

We are however reminded to note 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. It must thus be proved firstly that the property was found with the suspect, secondly that the property was positively identified to be the property of the complainant, thirdly that the property was stolen from the complainant. The proof as to time will in a large measure depend on how easy it is for the stolen property to move from one pair of hands to another. See the case of **Erick Otieno Arum v- Republic, Cr Appeal number 85 of 2005 (UR).**

In the instant case, we are satisfied just like the learned magistrate that the 1st appellant was found in possession of the 2 stolen items, the stove and table clock hardly 2 days after the robbery. The same were positively identified by the complainant. It is our view that the time between the recovery and the robbery was not so long as to cast any doubt on the prosecution evidence. The nature and state of the items were not the kind of items that could easily exchange hands. They were more or less souvenirs. Having been found in possession, the 1st appellant was under a duty to explain how he had come to be in possession of the same in accordance with Section 111 (1) of the Evidence Act. Although the 1st appellant alleged that he was not at the scene of the crime, he still had a duty to explain how he had come by the stolen items. All he said was-

"… The items were not recovered from my home. PW1 and PW2 lied. I saw the items at the police station…"

In our view, the 1st appellant did not discharge the duty. There is overwhelming evidence by PW 2 and PW 3 on how the items were recovered in the possession of the 1st appellant. We do not believe that these witnesses will have made up the story of the recovery of the stolen items in the possession of the items.

In the result we are satisfied that the appellants' conviction was safe. The appeals therefore lack merit. They are dismissed.

JUDGEMENT DATED, SIGNED and **DELIVERED** at **MACHAKOS** this **15TH** day of **JUNE, 2012**

ASIKE – MAKHANDIA **GEORGE DULU**

JUDGE **JUDGE**