REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAKURU

Criminal Appeal 305 of 2010

(From original conviction and sentence in Criminal Case No. 208 of 2008 of the Principal Magistrate's Court at Naivasha – T.W.C. WAMAE, MRS)

PATRICK KAMWORA MUIGAI…......………………..APPELLANT

VERSUS

REPUBLIC……………………………………..…RESPONDENT

JUDGMENT

Patrick Kamwora Muigai and Samuel Geshemba Njoroge were jointly charged with five counts of robbery with violence, contrary to **Section 296(2)** of the **Penal Code**. The particulars of charges were as here under:-

Particulars of the 1st count are that:-

On 25/5/08 at Mukungi trading centre in Nyandarua South District within Central Province with others not before court while armed with dangerous weapons namely pangas, metal bars, rungus and a firearm robbed Joseph Mugii Wahinya Kshs.32,600/- one mobile phone make Nokia 1110 ID card; Equity Bank card and Muki Coop card all valued at Kshs.40,000/- and at or immediately before or immediately after the time of such robbery used actual violence on the said Joseph Mugii Wahinya.

Particulars of 2nd count are that:-

On 25/5/08 at Mukungi trading centre in Nyandarua South District within Central Province with others not before court while armed with dangerous weapons namely pangas, metal bars, rungus and a firearm robbed Mary Wambui Kimani Kshs.4,000/-, one radio make arteck, amplifier, ten bottles tusker beer and 6 packets, sportsman cigarettes all valued at Kshs.9,050/- and at or immediately before or immediately after the time of such robbery used actual violence on the said Mary Wambui Kimani.

Particulars of the 3rd count are that:-

On 25/5/08 at Mukungi trading centre in Nyandarua South District within Central Province with others not before court while armed with dangerous weapons namely pangas, metal bars, rungus and a firearm robbed Peter Maina Kariuki one mobile phone make Nokia 1110 and a pair of brown shoes all valued at Kshs.3,500/- and at or immediately before or immediately after the time of such robbery used actual violence on the said Peter Maina Kairuki.

Particulars of the 4th count are that:-

On 25/5/08 at Mukungi trading centre in Nyandarua South District within Central Province with others not before court while armed with dangerous weapons namely pangas, metal bars, rungus and a firearm robbed Peter Maina Kariuki one mobile phone make Nokia 1110 and a pair of brown shoes all valued at Kshs.3,500/- and at or immediately before or immediately after the time of such robbery used actual violence on the said Peter Waweru Gacuhi.

Particulars of the 5th count are that:-

On 25/5/08 at Mukungi trading centre in Nyandarua South District within Central Province with others not before court while armed with dangerous weapons namely pangas, metal bars, rungus and a firearm robbed Peter Maina Kariuki one mobile phone make Nokia 1110 and a pair of brown shoes all valued at Kshs.3,500/- and at or immediately before or immediately after the time of such robbery used actual violence on the said Peter Wahinya Githinji.

In the alternative Patrick Kamwora was charged with handling stolen goods contrary to contrary to **Section 322(2)** of the **Penal Code**.

Particulars of the alternative count are that:-

On the 26th day of May 2008 at Ndunyu Njeru trading centre in Nyandarua District within Central Province, otherwise than in the course of stealing dishonestly received or retained one pair of brown leather shoes valued at Kshs.1,000/- knowing or having reason to believe it to be stolen goods or unlawfully obtained.

After a full trial, Patrick Kamwora Muigai, the appellant, was found guilty and convicted on the five counts. The 2nd accused was acquitted of all the charges. The appellant was then sentenced to death by the trial court. He is aggrieved by that judgment and preferred this appeal. The petition of appeal contains 9 grounds of appeal which are as here below:-

1. That the trial magistrate failed to warn the appellant of the gravity of the offence which resulted in an unfair and impartial trial;

2. That the magistrate failed to inform the appellant of his rights under Section 214 of the Criminal Procedure Code which rendered the trial flawed;

3. That the trial magistrate erred in relying on the evidence of PW1 and 3 yet they did not positively identify the recovered property;

4. That the trial court erred in invoking the doctrine of recent possession;

5. That the court erred in failing to make a restitution order under Section 177 of the Criminal Procedure Code;

6. That the court misdirected itself by relying on the evidence of PW1 and 2 on identification;

7. That the court failed to closely examine the circumstantial evidence adduced by the prosecution;

8. That the trial court failed to consider the appellant's defence.

The appellant filed written submissions and urged some grounds orally. The learned State Counsel Mr. Nyakundi opposed the appeal on the grounds that the appellant was arrested while in possession of the stolen items a few hours after the robbery by PW9 and was unable to explain how he came by them; that the items were positively identified. On the allegation that the prosecution failed to recall PW1 Mr. Nyakundi submitted that PW1's evidence was not material and did not form the basis for the conviction and in any case, he was recalled as PW3 when the matter started afresh. As to whether the faillure to produce the inventory was prejudicial to the appellant, counsel urged that those are procedural matters under the Police Act and the trial court considered the totality of the evidence before convicting the accused.

On 2/2/2010, Ms Thuita, counsel for both accused persons applied that the matter starts afresh under **Section 200(3)** of the **Criminal Procedure Code**. By this time, three witnesses had testified. The court ordered that the hearing starts de novo. It started afresh on 17/3/2010 before the Senior Principle Magistrate, T.W.C. Wamae. The prosecution called a total of nine (9) witnesses. There seems to have been a mistake in the numbering of the witnesses in the typed proceedings. They should be as listed here below:-

PW1, Mary Wambui Kimani;
PW2, Peter Maina Kariuki;
PW3, Joseph Mureu Wahinya;
PW4, PC Chrispus Karunyu;
PW5, Dr. James Silvanus;
PW6, Cpl Stephen Kimotho;
PW7, Peter Wahinya Githenji;
PW8, Paul Waweru;
PW9, Peter Nyaga Matheri.

The brief facts of the prosecution case are that on 25/5/2008, PW1, Mary Wambui Kimani an attendant at Pumzika bar, PW2, Peter Maina Kariuki, a patron, and PW7, Peter Wahinya Githinji were at the said bar when robbers struck. They told the court that one of the robbers who was armed with a gun hit the lamp with the gun, it broke and went off. All the people present in the bar were ordered to lie down. PW1 was injured and robbed of Kshs.5,000/-, a pair of shoes, 10 packets of cigarettes, car radio, 5 bottles of Kane and two mobiles. PW2 was also injured and robbed of shoes and a Nokia phone. PW7 was also injured and his identity card and voting card were stolen but later found outside the bar. Thereafter they all went to hospital and were examined by Dr. Wainaina of Naivasha District Hospital. Their P3 forms were produced in evidence by PW5. PW1 and PW2 told the court that it is the appellant who was armed with the gun and hit the lamp. PW7 did not identify the appellant. PW3, Joseph Mogu the owner of the bar was at his shop nearby when he heard screams at the bar. He went to the bar, found accused 2, his neighbour, at the door, upon entering he was pushed into the bar by accused 2, cut on the head, robbed of several items including Kshs.32,000/- phone, ATM Card. He found other people in the bar on the floor. He lost consciousness till he came to when in hospital. On 22/6/08 he identified accused 2 at the police station and also his radio and amplifier for which he had receipts but were not produced in evidence. PW8, Paul Waweru, heard shouts from the bar when in his house, he went to the bar to see what was happening, found somebody armed with a gun. He too was made to lie down, was injured and robbed. On 26/5/2008 PW4, PC Karonyo re-arrested the appellant from members of the public who claimed to have found him in possession of stolen goods i.e. radio, amplifier and shoes. PW6, AP Corporal Stephen Kimotho was a the Kinangop Police Post when a matatu tout informed him that he had arrested a suspect with stolen property. He recovered a radio, amplifier and shoes. He interrogated the owner of the bar who identified the radio and amplifier. Peter Nyaga (PW9) who described himself as a manager of Aberdere Matatu Sacco said he was going to his place of work at 5.30 a.m. on 26/5/2008 when he saw the appellant carrying a radio, amplifier and shoes. The appellant drunk. Mureithi identified the amplifier as similar to the one stolen from Pumzika bar and they took the appellant to the Police Station.

When called upon to defend himself, the appellant gave a sworn statement in which he stated that as of

20/5/2008, he was a matatu driver in matatu No. KAW 173B which had earlier been driven by one Mureithi. Mureithi was unhappy about him taking over the job and he conspired with other touts at Ndunyu Njeru stage to prevent him from picking passengers. On 26/5/08 while at the stage, Nyaga closed the door to the stage and threatened him; That Nyaga (PW9) with Muriithi and 8 others attacked him, robbed him of money and shoes and he was taken to the Chief's office where Cpl Karonyo, PW9, re-arrested him, took him to Kinangop police station where he was charged for an offence he knew nothing about. He denied having the contacts of his conductor and employer.

We shall now analyse and evaluate the evidence as we consider the grounds raised. The appellant complains that the court failed to inform him of his rights under **Section 214** of the **Criminal Procedure Code**. The appellant was first charged with five counts of robbery with violence on 4/6/2008. He denied the charges. On 22/8/08, the case was consolidated with another, Criminal Case No.301/08, where there was another accused person, Sammy. The five counts were read to the appellant and his co-accused and he denied the offences. On 31/6/2010, during the testimony of PW3, the prosecutor applied to step down the witness so that substituted charges could be read to the appellant. The appellant and the co-accused pleaded not guilty and the case proceeded to further hearing under **Section 214, t**he **Criminal Procedure Code** gives the court discretion, at any stage of the proceedings, if the charge is defective, in substance or form, to alter the charge by way of amendment, substution or addition of a charge, if it thinks necessary to do so. In this regard, the charges were read to the appellant. If he did not understand them, he should have said so. He did not tell the court what rights were not explained to him under **Section 214** of the **Criminal Procedure Code**. One of the rights available under that section is recalling of witnesses and the appellant did request to recall PW1, Mary Wambui. We believe and find that the appellant understood what his rights were after substitution or amendment of charges and he did take cognisance of those rights.

Whether the failure to recall PW1, Mary Wambui, was prejudicial to the appellant's case; in her evidence, PW1 recalled that she saw the appellant enter the bar armed with the gun and hit the lamp which went off. It is thereafter that the people in the bar were robbed. No identification parade was conducted to test whether or not PW1 was able to identify the appellant. Instead PW1 was shown the appellant at the police post. The evidence against the appellant was based on identification and recent possession. PW1 said she identified the radio that was recovered from the appellant. Her evidence was very relevant to the identification of the appellant and identification of the recovered property. Although the appellant did not state why he wanted PW1 recalled, having done so and the prosecution having not objected to that request, PW1 should have been recalled. Failure to recall PW1 was prejudicial to the defence case and dealt a blow to the prosecution case.

As earlier pointed out, PW1 and 2 told the court they were able to see the appellant who entered the bar while armed with a gun and he hit the lamp. This incident occurred about 9.00 p.m. PW7 who was in the bar was not able to identify the appellant. The prosecution did not inquire from PW1 and 2 on how they were able to see the person who had the gun, how far the lamp was from the door and whether there was anything that would have interfered with the proper view of the intruders.

In **R v Turnbull and Others (1976)3 ALL ER 549**, the court discussed what the court should consider when relying on evidence of identification. The court said:-

"…the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? …. Finally, he should remind the jury of any specific weakness which had appeared in the identification evidence. Recognition may be more reliable than identification of a stranger; but, even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends

are sometimes made."

It is obvious that the evidence of PW1 and 2 did not meet the threshold set out in the above case. See also **Abdalla Bin Wendo v R (1953) EACA 166.**

The other ground of appeal is that the court failed to make restitution under **Section 177** of the **Criminal Procedure Code**. The court has a discretion to order restitution of property. The appellant did not tell the court what property was supposed to be restituted, and to whom. He did not lay any claim to the radio amplifier and shoes that were allegedly found on him. The other items found on the appellant i.e. wallet, keys and documents were not exhibits in the case and could not be the subject of restitution.

It is PW9 who stopped and arrested the appellant with a radio, amplifier and white sports shoes at 5.30 a.m. on 26/5/2010. PW9 denied having known the appellant before but that one Mureithi identified the radio and amplifier as the one which he used to see at Pumzika bar where a robbery had occurred the night before. PW4 told the court that it is Mureithi who caused the appellant to be arrested. PW9 stated that, had it not been for Mureithi, the appellant would not have been arrested. Unfortunately, Mureithi was never called as a witness. There is no evidence on record as to why the prosecution did not call the said Mureithi as a witness. In **Ahmed Ramson v Rep (1955)EA**, it was held:-

"It is the burden of the prosecution to avail all the material evidence to the court to enable the court arrive at a fair and impartial decision. The prosecution must summon all the material witnesses and avail or furnish the court with all facts even those whose evidence may have been unfavourable for it."

In **Bukenya v Rep. (1972)EA 549**, it was held that where the prosecutor fails to call a witness and it transpires that the evidence in support of the charge against the accused is barely adequate, the court in trying the case is perfectly entitled to draw an adverse inference that had the witness testified, his evidence would have tended to be adverse to the prosecution case. In his defence, the appellant alleged that the said Mureithi had a dispute with him. The appellant had in cross examination of PW4 and PW9 brought the role of Mureithi played into focus. Having been mentioned by PW4 and PW9, it was incumbent upon the prosecution to call the said witness. It is evident from the court record that the lower court at one stage refused to allow the prosecution any more adjournments. But it is not recorded anywhere that Mureithi was one of the remaining witnesses.

In the instant case, Mureithi was a material witness to this case and the appellant raised issue with his arrest by Mureithi. We hold that an adverse inference is justified in this case regarding the failure to call Mureithi and arrest of the appellant.

The appellant complained that the radio, amplifier and shoes were not positively identified by the prosecution witnesses. PW1 told the court that she had just been using the radio which was stolen during the robbery and was recovered a few hours later. The police officers did not request for any mark on the radio or amplifier. PW3 the owner of the bar said that he had a mark of a cello tape on the radio but that mark had not been pointed out to the police officers. Though PW3 purported to produce receipts which were marked for identification, they were never produced in evidence. In our view it is not always true that one keeps receipts for everything in their possession of a radio or shoes or that everybody will make a mark on every item in their possession. We are satisfied that PW1 who had been using the radio and PW3 the owner of the radio, were in a position to identify the radio which had just been stolen a few hours before recovery. The lower court convicted the appellant based on the doctrine of recent possession. In the case of **Isaac Nganga Kahiga *alias* Peter Njenga Nganga Kahiga Vs RepublicCriminal Appeal No. 272 of 2005**, the court set out the guidelines on what the court should consider before a conviction can be based on the doctrine of recent possession. The court said;

"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."

We find that the radio and amplifier were positively identified by PW1 and PW3, and they had just been stolen from PW3's bar a few hours before recovery. The only question left is whether it is the appellant who was found with the items.

In his defence, the appellant said that he was a matatu driver and he had disagreed with PW9 and Mureithi and that he was frame. He denied that the radio and amplifier were found on him. As pointed out earlier in this judgment, failure to call Mureithi as a witness left a gap in the prosecution evidence. The court is left to imagine what he had to say. Having found as above this court cannot find with certainty as the trial court did, that it is the appellant who was found with the recovered items.

In the end, we find enough doubt raised in the prosecution evidence which doubt should have been exercised in favour of the appellant. We also found that the failure to recall PW1 was prejudicial to the defence case and for the above reasons we find the conviction to be unsafe. We quash the conviction and set aside the sentence. he appellant is set at liberty forthwith unless otherwise lawfully held.

DATED and DELIVERED this 12th day of June, 2012.

R.P.V. WENDOH
JUDGE

W. OUKO
JUDGE

PRESENT:
Appellant – in person

Mr. Nyakundi for the respondent

Kennedy – Court Clerk