REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 181 OF 2009

CONSOLIDATED WITH CRIMINAL APPEAL 183 OF 2009

JOHN GICHOVI MUTURI……...……………..………………..1ST APPELLANT

CEASAR NJERU NJIRU……………….……………………..2ND APPELLANT

VERSUS

REPUBLIC…….……………..………………….……………..…..RESPONDENT

From original conviction and sentence in Cr. Case No. 365 of 2008 at the Chief Magistrate's Court at Embu

JUDGMENT

JOHN GICHOVI MUTURI & CEASAR NJERU NJIRU hereinafter referred to as the 1st and 2nd Appellants respectively were charged with the following offences:-

1ST COUNT

ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296(2) OF THE PENAL CODE

The particulars as indicated in the charge sheet were as follows:-

JOHN GICHOVI MUTURI & CEASAR NJERU NJIRU: On the 27th March 2008 at around 1:30am at Dallas Estate in Embu Municipality Location, Central Division in Embu District within Eastern Province, jointly with others not before court, being armed with dangerous weapons namely pangas and iron bars robbed MARY WANJIKU one television set make J.V.C. coloured 14" inches S/NO. 16169701 valued at Ksh. 8,500/= a DVD machine make Royal tech valued at Ksh. 4,000/= and a detachable radio speaker valued at Ksh. 4,000/=. All to the total value of Ksh. 16,500/= and at or immediately before or immediately after the time of such robbery used actual violence to the said MARY WANJIKU.

2ND COUNT

HAVING SUSPECTED STOLEN PROPERTY CONTRARY TO SECTION 323 OF THE PENAL CODE

The particulars as indicated in the charge sheet were as follows:-

<u>JOHN GICHOVI MUTURI:</u> On the 27th day of March 2008 at around 3:00 am at Ndumari village in Embu Municipality location central division Embu district within Eastern Province, having been detained by C.I. George Muyonga, IP. Gilbert Nyale, PC Ali Galmalo PC, Reuben Munialo (dog handler) as a result of the exercise of the powers conferred by section 26 of the criminal procedure code in his possession one Television set make GLD 14' coloured S/NO. 462697 reasonably suspected to have been stolen or unlawfully obtained.

<u>3RD COUNT</u>

The particulars as indicated in the charge sheet were as follows:-

CEASAR NJERU NJIRU: On the 27th day of March, 2008 at around 4:00am at Majimbo Village in Embu Municipality Location Central Division in Embu District within Eastern Province having been detained by C.**I. George Muyonga, IP. Gilbert Nyale, PC Ali Galmalo, PC Rueben Munialo, (dog Handler) as a result of the powers conferred by Section 26 of the Criminal procedure Code, had in their possession one VCD make JVC and six new pieces of clothes, reasonably suspected to have been stolen or unlawfully obtained.**

After a full hearing they were convicted and sentenced to death on 1st count.

The 1st Appellant was convicted and sentenced to 3 years imprisonment on the 2nd count. And the 2nd Appellant was convicted and sentenced to 3 years imprisonment, on the 3rd count. And being aggrieved by the judgment they have appealed against the conviction and sentence. They have raised the following grounds:-

<u>1ST APPELLANT</u>

1. That the learned trial magistrate erred in both law and facts by holding that the prosecution had proved a charge contrary to section 322(2) of the penal code whereas evidence was too apparent to the effect that the alleged exhibits MFI – I, 2 and 3 were planted on the Appellant as their recoveries, and acknowledgement before court was made and included on the charge sheet on 09/07/2008, the appellant having taken plea on 31/03/2008 hence conviction on a defective charge.

2. That the learned trial magistrate erred in both law and facts and misdirected herself by failing to have narrowly examined the alleged circumstantial evidence leading to the arrest of the 2nd and 3rd Appellants from their house which evidence fails the legal test and so was to tracking down the Appellant to his arrest.

3. That the learned trial magistrate erred in both law and facts and misdirected herself by convicting the appellant on reliance to the alleged exhibits evidence in non-compliance to section 38 of the Police Act and 177(a) of the Criminal Procedure code hence the proceedings are flawed.

4. ***That the circumstances surrounding the appellant's arrest was not satisfactory nor does prove the Appellant's participation into the commission of the offence charged and the entire case for the prosecution was not proved beyond any reasonable doubts.***

<u>2ND APPELLANT</u>

1. That the learned trial magistrate erred in law and in fact by convicting the Appellant without considering the fact that the charges were defective.

2. That the learned trial magistrate erred in law and in fact by convicting the Appellant while the alleged dangerous weapons used were not recovered and produced as exhibits.

3. That the learned trial magistrate erred in law and in fact by failing to consider the fact that the Appellant was not positively identified by the complainant.

4. That the learned trial magistrate erred in law and fact by convicting the Appellant while there were no recoveries of the alleged stolen items from the Appellant.

5. That the learned trial magistrate erred in law and in fact by contravening the provisions of Section 169(2) of the Penal Code while delivering her judgment.

6. The learned trial magistrate erred in law and in fact by convicting the Appellant when the prosecution had not proved their case beyond reasonable doubt.

7. ***The learned trial magistrate erred in law and in fact by disregarding the Appellants defence that he knew nothing on the alleged robbery.***

When the appeal came before us for hearing the 1st Appellant who was unrepresented and presented the court with written submissions. He challenges the substituted charge sheet of 09/07/2008, saying it was an afterthought. He says the evidence against him was circumstantial. There was no evidence connecting him with the allegedly recovered items. He challenges the evidence of the recovery of items as contravened the provision of section 25A of the Evidence Act.

M/s Muthoni for the 2nd Appellant argued all the grounds together submitting that the charge sheet was defective as it included the words ***"Jointly with others not before court"*** And Count 3 did not have a charge. Further none of the stolen items were recovered from the 2nd Appellant. What was recovered was not the subject of 1st count. The defence explains this.

P.W.I gave no known description of the Appellant. It's his co-accused who implicated him. P.W.I's identification of the 2nd Appellant is doubtful The ownership of the house where the suspected stolen goods were recovered from was not established.

(Ref: ABDILA HAMAN ALLOW OMAR & 2 OTHERS NYERI CR. APPEALS NOS. 119, 123 & 124/08)

No confession was taken from the 1st Appellant as he implicated his accomplice.

M/s Macharia for the State opposed the appeal saying both Appellants were identified by P.W.I. The sniffer dog led them to 1st Appellant's house, and several items recovered. They were identified by P.W.I. P.W.I had given a description of the grey jacket to the police. These recovered items are not claimed by 1st Appellant. Receipts for the recovered items were produced. 2nd Appellant's face was not masked, and there was electricity in the house. P.W.I identified the 2nd Appellant in an identification parade.

As has been held in several cases the duty of the 1st appellate Court is to reconsider and re-evaluate the evidence and come to our own decision. We are also alive to the fact that we neither saw nor heard the witnesses.

(REF: OGETO VERSUS REPUBLIC [2004] (2) KLR 14)

The prosecution case was that P.W.I was asleep in her house on 27/03/2008 at 1:30am when she heard a bang on her door. She went to the sitting room and switched on the lights. The door was hit again and again and it gave in. Three people entered. Two of them wore masks. They had pangas and iron bar. They demanded for money and cell phone as they hit her on the head, hands, and leg with an iron bar and she fell. She explained how 2 of them were dressed. They stole her JVC 14 Inch T.V, DVD royal make, radio detachable speaker all worth Ksh. 16,500/= (EXBI, 2 & 3). She then identified 2nd Appellant at an

identification parade. She did not identify the others. She was treated (EXB 5). These items were also identified by P.W.2 as belonging to his wife (P.W.I).

P.W.3 and P.W.4 received a report of the robbery and went to the scene. After assessing it he went for the police dog. The dog followed foot marks up to a house occupied by the 1st Appellant. He opened and upon conducting a search the following items were found:-

2 TV sets, (GLD & JVC makes) a loyal DVD and a Radio detachable speaker.

P.W.I identified them as EXB I, 2, 3 and as belonging to her. Also recovered was a muddy black trouser (EXB 6), muddy grey jacket (EXB 7), wet black woolen mask (EXB 8), muddy cream shoes (EXB 9). The 1st Appellant led him to a house in Majimbo from where the 2nd appellant and another were arrested. Recovered from therein were:-

1 VCD player (EXB 12), 6 pieces of clothes (EXB 13), wet dark blue jeans trouser (EXB 14), light blue jacket and brown shoes (EXB 16) light blue shirt (EXB 15). A stone was also recovered from the scene(EXB 10).

P.W.5 conducted an identification parade whereby P.W.I identified the 2nd Appellant.

The Doctor (P.W.7) confirmed that P.W.I had been assaulted. Her forehead was swollen, back and right leg were also swollen and tender. P.W.3, P.W.4, and P.W.6 who went to the scene of incident stated that the culprit described the manner of dressing of the robbers.

In his defence the 1st Appellant stated that he is a carpenter. On 26/03/2008 he retired to bed after leaving Marakki Bar at Dallas at 9:00pm. At 5:00am his door was knocked and he opened for people who were police officers. They collected a GID TV, battery, amplifier GVC 3 speaker and radio. He was escorted to the station. He was not identified.

The 2nd Appellant also unsworn returned home after being at Green bar within Embu. At 4:00am he heard a knock on his door and opened it. Police officers were there. They asked him why his radio was still on. He was then asked for Ksh.500/= which he did not have. He was arrested together with a VCD machine, battery phone and others.

The evidence adduced clearly confirms that P.W.I was robbed of the items mentioned in the charge sheet. P.W.I produced receipts of purchase of these items EXB I7 & 18. Her evidence was supported by that of her husband P.W.2. The officers who went to the scene collected the broken door frame and the stone used to break the door as exhibits (EXB 4 & 10). This confirms that a robbery took place.

The grounds raised will be dealt with together. These broadly are the issue of identification and the way the accomplice evidence was handled.

We wish to start with the evidence concerning the 1st Appellant. He was not identified by P.W.I. The evidence linking him to this offence is that of the police officers P.W.3, P.W.4 and P.W.6 who were led to his house by a sniffer dog. And in his house were recovered several items. Three of these items EXB I, 2 & 3 were among those in the charge sheet and which were positively identified by P.W.I and P.W.2. Receipts for these items were produced as EXB 17 & 18. The argument by 1st Appellant that the sniffer dog should have gone to other places because the attackers were 3 does not hold any water. He denied having been found with those items and that they were planted on him.

The evidence of P.W.3, P.W.4 and P.W.6 was so consistent. They had no reason whatsoever to plant anything on him. The sniffer dog was just doing its work. The evidence of the witnesses is not circumstantial but direct evidence. We have looked at the original charge sheet which was in Court on 31/03/2008 when the Appellants took plea. The same was substituted on 09/07/2008. What the 1st Appellant has submitted on these charge sheet is not correct. The correct position is that the items said to

have been found with him were clearly indicated in the original principal count and the alternative count of Handling Stolen Goods. There was nothing new as concerns the items which were indicated in the substituted charge sheet.

Upon recovery of these items P.W.I was immediately called and she identified them. The 1st Appellant did not give any explanation for his possession of the items belonging to P.W.I.

We are satisfied that the learned trial Magistrate analyzed the evidence well and arrived at the correct decision. We see no reason to make us interfere with that decision in the 1st count. The 2nd count for which he was sentenced to 3 years imprisonment was not the subject of this appeal. However after considering the evidence we see no reason of interfering with it.

We now come to the 2nd Appellant. The charge sheet is said to have indicated that the accused were with others not before Court, yet the evidence was that the people who attacked P.W.I were only three and they had all been charged. The issue here would be with the addition of words ***"with others not before Court"*** and if they caused any prejudice to the Appellants. The Appellants have not shown any prejudice caused and neither do we find any.

In the case of ***NYABUTO & ANOTHER VERSUS REPUBLIC 2009 KLR 409*** the Court of Appeal was faced with a similar issue and it held as follows:-

"The Omission or the irregularity in the charge that the Appellant had been "jointly charged" or "jointly with others not before court," had not occasioned the Appellants any failure of Justice."

We do find that the inclusion of those words did not occasion the Appellants any failure of justice.

The evidence considered by the learned trial Magistrate in convicting the 2nd Appellant was twofold.

1. ***The implication by the 1st Appellant as he was not found in possession of anything belonging to the complainant.***

2. ***The identification by P.W.I.***

It is true from the evidence adduced that it was the 1st Appellant who told the officers who arrested him that the 2nd Appellant was involved in the robbery the subject of this case.

Section 32(I) of the Evidence Act provides;

"when more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other such persons is proved, the Court may take the consideration as against such other person as well as against the person who made the confession"

This is what is referred to as accomplice evidence. It requires corroboration.

In the case of ***NGUKU VERSUS REPUBLIC [1985] KLR 413*** the Court of Appeal had this to say about accomplice evidence;

"In dealing with the evidence of an accomplice, the court should first of all establish whether the accomplice is a credible witness and thus look for some independent evidence as corroboration connecting the accused person with the offence."

Section 25A of the Evidence Act which was in issue in the case of ***JOHN KABORO KIBORO alias GATURI VERSUS REPUBIC COURT OF APPEAL NYERI CRIMINAL APPEAL NO. 248/08*** dealt

with the statement of a suspect incriminating himself. A proper confession has to be taken as per the provision of section 25A of the Evidence Act. The said case is distinguishable from our present case in that the 1st Appellant was incriminating not only the 2nd Appellant but himself.

Following this information the police officers went for the 2nd Appellant. Nothing of P.W.I was found in his possession. There were other items he was found with which was the subject of the 3rd count. It is because of this 3rd count that he was arrested.

The main evidence pinning down the 2nd Appellant is that of identification by P.W.I.

When the officers came to the scene P.W.I told them one of the attackers was not masked. P.W.I states that she gave the officers a description of the robbers. P.W.4 and P.W.7 stated that P.W.I described the attackers. Actually none indicated what P.W.I exactly told them. It is true that PWI identified the 2nd Appellant at the identification parade. However, before any identification parade is conducted the witnesses must have given a description of the culprit to the investigating officer or a police officer.

In the case of ***SIMIYU AND ANOTHER VERSUS REPUBLIC [2005] I KLR 193*** it was held:-

"In every case in which there is a question as to the identity of the accused, the fact of there having been a description given and the terms of that description are matters of the highest importance of which evidence ought always to be given first of all by the person or persons who gave the description and purport to identify the accused and then by the person or persons to whom the description was given."

The description is meant to assist in arresting the accused if no arrests have been made. In this case P.W.I did not tell the Court the description she gave to the officers and neither have the officers stated the description they were given if any.

Without any such preceding description the identification parade is not of much value. It will also require corroboration.

Evidence requiring corroboration cannot corroborate other evidence which requires corroboration. Therefore neither the incriminating evidence of the 1st Appellant nor the unsupported identification evidence of P.W.1 could found a conviction against the 2nd Appellant. The items he was found with were not part of the items in the particulars of the charge in the 1st count. We therefore find that it was unsafe for the learned trial Magistrate to convict the 2nd Appellant on such evidence.

Our attention has also been drawn to the 3rd count in the charge sheet. There is no statement of offence indicated. One is therefore left wondering what was actually read to the 2nd Appellant at the time of plea. The conviction on that count has no basis and will not be allowed to stand.

The upshot of all this is as follows:-

1. The appeal by the 1st Appellant is found to lack in merit and is dismissed. We uphold the conviction and sentence of the lower Court.

2. The Appeal in respect of the 2nd Appellant is allowed. We quash the conviction and set aside the death sentence by the lower Court.

3. ***We also quash the conviction, and set aside the sentence of the purported 3rd count.***

The 2nd Appellant will be set free unless otherwise held under a separate warrant.

Right of Appeal explained

DATED AND DELIVERED AT EMBU THIS 21ST DAY OF SEPTEMBER 2012

LESIIT J.	**H.I. ONG'UDI**
JUDGE	**JUDGE**