REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Criminal Appeal 232 of 2008

MARTIN KABOGO MUCHIRA.....APPELLANT

VERSUS

REPUBLIC …….. RESPONDENT

(From the original conviction and sentence in Criminal Case No.89 of 2008 of the Resident Magistrate's Court at Gatundu by A.Lorot – Senior Resident Magistrate)

J U D G M E N T

The appellant, **MARTIN KABOGO MUCHIRA**, was convicted on 2 counts of Robbery with violence **contrary to Section 296 (2) of the Penal Code.** He was thereafter sentenced to suffer death as by law prescribed.

In his appeal to this court, the appellant has raised five (5) issues, as follows;

(1) The trial court failed to give consideration to the absence of an opportunity for positive identification.

(2) The doctrine of recent possession was wrongly applied as there was suspicion about the recovery of the stolen items.

(3) The case was not proved beyond any reasonable doubt.

(4) The trial court did not comply with *section 207 (1) of the Criminal Procedure Code,* ***at the time of taking plea.***

(5) The defence was not given due consideration.

When canvassing the appeal, the appellant emphasized that the exhibits were not recovered from him.

Secondly, he said that the circumstances prevailing at the time the offence was committed were not conducive for positive identification. It was dark and the complainants were each attacked from behind.

The appellant also faulted the trial court for allowing **PW 3** to testify after he had sat in court when other witnesses were testifying.

It was the appellant's contention that he was a victim of a frame-up charge, which was calculated to remove him from the area, so that **PW 3** could not have competition in his business. According to the

appellant, his business of selling chang'aa was giving stiff competition to the business of **PW 3**, in which he sold beers.

Furthermore, submitted the appellant, his defence was not accorded due consideration.

In answer to the appeal, Mr. Mulati, learned state counsel, submitted that the appellant was recognized by **PW 1**.

Thereafter, the appellant was pursued and was then arrested by **PW 3** and **PW 4**. At the time of arrest, the appellant is said to have been found in possession of **PW 2's** shoe, which had just been stolen.

Finally, because the robbers were 4 in number, and because they were armed with rungus, the respondent submitted that the ingredients of the offence of robbery with violence were proved.

Being the first appellate court, we have re-evaluated all the evidence on record and drawn our own conclusions therefrom.

It is common ground that the complainants were attacked at night. The time was about 8.00p.m.

PW 1 testified that darkness had not set in. One man grabbed him from behind, gripping his neck. A second person pocked him on his stomach, using a stick.

Simultaneously, the assailants lifted up the complainant, and quickly ransacked his pockets. They stole his matchbox and KShs.120/-. They also stole his shoes.

During the robbery, **PW 1** says that he identified the appellant, who hailed from the same village. He testified that he identified the appellant when he was removing his shoes. At that moment, the appellant was below **PW 1**.

After the robbers ran off, **PW 1** went to the home of Kibe. The 2 of them then returned to the scene. **PW 1** recovered his cap.

On the next day, **PW 1** learnt that 2 pairs of shoes had been recovered, and were at the Gatundu Police Station.

PW 1 went to the police station, where he was shown 2 pairs of shoes. He identified one pair as his.

PW 2, DR. PATRICK MBURU NGUGI, is the complainant on Count 2. He was robbed of his shoes at about 8.30p.m. He too was grabbed by the neck, from behind. He was then lifted off the ground, and his shoes were removed.

PW 2 did not identify any of his 4 attackers.

After the attack, **PW 2** went straight home.

On the next morning, he met **PW 4**, who informed him that his shoes had been recovered from the appellant. When **PW 2** went to the police station, he identified one shoe. The other half of the pair was not recovered.

PW 3, STEPHEN KIBE KARANJA, operates a bar called Githioro Bar. At about 8.30p.m, 2 girls ran to **PW 3's** bar, and told him that **PW 1** was being robbed by the appellant together with other persons. The 2 ladies were Wangui and Muthoni.

As **PW 3** was also a member of the Community Policing team in that locality, he quickly mobilized some young men and they went towards the area where **PW 1** was being robbed. They saw the appellant with 3 others, carrying sticks and shoes.

When **PW 3** told the appellant to surrender the shoes which they had robbed from **PW 1**, the appellant threw away one shoe. However, he was arrested with one shoe, whilst his accomplices took off with a second pair of shoes.

During cross-examination, **PW 3** said that the appellant used to sell chang'aa, whilst he **(PW 3)** used to sell beer. But he denied having vowed that the appellant would never again sell chang'aa.

PW 4, GEORGE MUCHIRA NJOROGE, testified that he was at home on the material night, when he heard noises from the road. The noises were being made by people talking.

PW 4 went out, where he met **PW 3** with others. **PW 3** told him that **PW 1** had been attacked and robbed by the appellant together with others.

According to **PW 4**, there was moonlight, which helped them see the 4 assailants.

PW 4 testified that he identified only the appellant amongst the 4 persons. The appellant was the son of his cousin.

PW 5, PC JOSEPH MAINA, was attached to the Gatundu Police Station at the material time.

He was at the station when the appellant was escorted to that station, by members of the village security team. They also brought to the station a pair of shoes, one other shoe and clubs, which they had recovered from the appellant and his accomplices who fled.

When the appellant was put to his defence, he said that he was arrested when he was walking back home, from a party. They accused him of robbing people. However, he denied the allegation. He also denied having been arrested with any of the things which had been stolen from the 2 complainants.

From the testimony of both **PW 3** and **PW 4**, they definitely considered the appellant to be a person of bad character. **PW 3** described him as a "regular mugger", and **PW 4** said that the appellant had previously robbed Kamau of Ichwai.

We cannot help but ask ourselves if those impressions held by those 2 witnesses had influenced their decision to link the appellant to the offences herein.

On the other hand, **PW 1** said that he identified the appellant during the robbery, and the appellant is said to have been in possession of shoes which had just been stolen from **PW 1** and **PW 2.**

How did **PW 1** identify the appellant? He asserted that he knew the appellant's voice, and also that he saw him when the appellant was removing his shoes.

PW 1 did not indicate that the appellant uttered any words to either him or to anybody else. Therefore, it is not clear how **PW 1** identified the appellant's voice.

Secondly, the incident took place at about 8.00p.m. PW 1 testified that darkness had not set in. As the appellant noted, it would be odd that at 8.00p.m. darkness had not set in.

In any event, we note that immediately after the robbers left, **PW 1** went to the home of a neighbour named Ireri. The 2 of them then returned to the scene, where Ireri lit a match, thus enabling PW 1 to find his cap from where it had fallen down.

The fact that **PW 1** was only able to find his hat after Ireri lit a match implies that it must have been dark. Therefore, when **PW 1** testified that darkness had not set in, his credibility was put to question.

It is also noteworthy that although **PW 1** said that he had identified the appellant, **PW 1** did not lead to the arrest of the appellant. If anything, he testified as follows;

"I woke up and because it was near home, I shouted that they should give me back my pair of shoes and cap because I was near home and they were robbing me yet they knew me. I had not known them."

In the same vein, **PW 1** said that he knew the appellant well. He and the appellant had gone to the same school, Ikuma Primary School. **PW 1** also said that he knew the appellant's home.

If **PW 1** knew the appellant so well, it makes no sense for **PW 1** to have also testified that he had not known the persons who robbed him.

And if **PW 1** knew the appellant's home, one would have expected him to lead straight to that home, either that same night or on the next morning. He did not.

When **PW 1** went to the police station, he was shown 2 pairs of shoes, yet **PW 3** and **PW 4** had only recovered one and- a- half pairs. That inconsistency has not been explained.

The reason why **PW 3** set out to pursue robbers is not because he had witnessed the incident. He was informed about the robbery by WANGUI and MUTHONI, who said that they had seen the appellant together with other persons, robbing **PW 1**. In effect, the said Wangui and Muthoni were a vital nexus in the evidence linking the appellant to the offence. They should have testified.

As the 2 ladies did not testify, the court was denied the opportunity of knowing the circumstances in which they had allegedly identified the appellant. Therefore, the court is unable to make an informed assessment as to whether or not the alleged identification was positive.

It is also noteworthy that **PW 2** was robbed about 30 minutes after **PW 1** had been robbed. As **PW 3**

"moved with speed to the scene after information"

was given to him by Wangui and Muthoni, who had seen **PW 1** being robbed, one would expect that the vigilante would have found **PW 2** still being robbed. But they did not. It would appear that a considerable amount of time lapsed before the vigilante proceeded to effect arrest.

And when they did catch up with the robbers, they only arrested the appellant, who also happened to be the only person they identified. That just goes further to confirm that the circumstances prevailing that night were not conducive for positive identification.

PW 3 said that he knew **PW 1's** shoes, and that at the time of arrest;

"I knew Kabogo. I ordered him to give me the shoes that he had robbed from Mburu. He threw one shoe of Mburu and was left with one. The team had two pairs. The rest left the other pair on the ground and ran away."

If that be true, then the pair belonging to **PW 2** was recovered intact, whilst **PW 1's** one shoe was not recovered by **PW 3**. However, **PW 1** later saw the 2 pairs at the police station, whilst **PW 2** only saw one part of his shoes.

The evidence simply does not add up!

In the result, the appeal is allowed. We quash the sentences. We order that the appellant be set at liberty forthwith unless he is otherwise lawfully held.

Dated, Signed and Delivered at Nairobi, this 16th day of October, 2012.

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FRED A. OCHIENG
JUDGE

LYDIA A. ACHODE
JUDGE