REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO. 88 OF 2008

PETER KIPCHIRCHIR KIPTOO …..…….…..…….. APPELLANT

VERSUS

REPUBLIC ……..……..… RESPONDENT

(Being an Appeal from the original conviction and sentence of Hon. G. A. Mmasi (Senior Resident Magistrate) in Eldoret CM.CR. No. 959 of 2008 delivered on the 5th November 2008)

JUDGMENT

The appellant, **PETER KIPCHIRCHIR KIPTOO** and another, appeared before the Senior Resident Magistrate at Eldoret facing six counts of robbery with violence contrary to S. 296 (2) of the Penal Code. It was alleged that on the 11th March 2008 within Uasin Gishu and Marakwet Districts while armed with firearms robbed Elias Kiprop Kwambai, Sammy Kibet Kosgei, Ben Kiptoo Rotich, Elizabeth Baliat, John Chesire and David Philip Cheptarus of their respective property and at or immediately after the robbery used or threatened to use actual violence to the said persons.The appellant was in the alternative charged with handling stolen property contrary to S. 322 (2) of the Penal Code. It was alleged that on the 20th March 2008, he handled a mobile phone knowing or having reason to believe it to be stolen. However, the alternative count was defective for duplicity (See, **SELIMIA MBEu OWUOR & ANOTHER V. REPUBLIC CRIMINAL APPEAL NO. 68 OF 1999 C/A**).

Be that as it may, the appellant pleaded not guilty to all the counts. He was tried, convicted on all counts and sentenced to death. However, being aggrieved by the conviction and sentence, the appellant lodged this appeal. His co-accused at the trial Court was acquitted on all the counts.

The grounds for the appeal are contained in the petition of appeal filed herein on 14th November 2008. The appellant relied on the same grounds at the hearing of the appeal in which he represented himself.

Basically, the appellant takes issue with the evidence of identification adduced against him by PW 1 and PW 3 and contends that the learned trial Magistrate erred in upholding and relying on the same in convicting him.

The appellant contends that the weapon used in the offence was not produced in Court and that the member of public found in possession of the mobile phone was not summoned to testify.

The appellant further contends that his name was not reflected in the first report made to the police.

For all the reasons aforementioned, the appellant urged this Court to set aside the conviction and sentence imposed upon him by the learned trial Magistrate.

The respondent opposed the appeal through the learned Senior Principal Prosecution counsel, **MR. OLUOCH**, who submitted that the conviction of the appellant was based on the doctrine of recent possession and on the evidence of identification adduced against him. The learned Prosecution Counsel noted that although PW 1 and PW 3 did not identify the robbers, they lost their property which were later recovered and identified by themselves. PW 1 identified his mobile phone while PW 3 identified his pairs of sandles and shoes and a packet of cooking oil, all found with the appellant.

The learned Prosecution Counsel submitted that PW 4 saw and recognized the appellant and was able to do so with the aid of lights inside a vehicle. The learned Prosecution Counsel therefore prayed for the dismissal of the appeal.

We have considered the grounds of appeal in the light of the submissions by the learned Prosecution Counsel and in keeping with our obligation to revisit the evidence and draw our own conclusions bearing in mind that the trial Court had the advantage of hearing and seeing all the witnesses, we note that the case for the prosecution was briefly that on the material date (i.e. 11th March 2008) between 7.00 p.m. and 1.00 a.m. a group of armed people posing as police officers invaded an area known as Kondabilet and robed some traders and farmers of their property including mobile phones, money, shop stock, clothes and bottles of alcoholic drinks. The traders and farmers included the complainants herein (i.e. PW 1, 2, 3, 4, 5, 6, 7 and 8). They were found by the robbers at various places within the trading centre. Some were at home and others inside bars. Nearly all of them save PW 4 and PW 7 failed to identify any of the robbers. PW 4 and PW 7 allegedly identified the appellant as having been part of the robbers.

A report of the robbery was made at Moiben Police Station and received by **S/SGT. DAVID KIPRUGUT (PW 10)** who commenced investigations by proceeding to the scene of the offence where he found a gathering of members of the public. On 20th March 2008, he was informed that a suspect had been arrested with a mobile phone which had been stolen. He went back to Kondabilet and the suspect was handed to him by members of the public. The recovered mobile phone make Motorolla C117 was also handed over to him. He (PW 10) said that the suspect was the appellant and that he (appellant) mentioned other suspects thereby leading to the recovery of additional stolen goods in a house belonging to one of the named suspects.

PW 1 identified the recovered mobile phone as belonging to him while PW 3 identified the recovered pair of shoes and cooking oil as belonging to him.

PW 6 was injured during the robbery. He was examined by a Clinical Officer at Moiben Health Centre (i.e. PW 9) and a P3 form filled accordingly.

The appellant was charged after completion of investigations. He denied the offences and said that he was arrested on the 20th March 2008 at Kondabilet. He was with his sister weeding vegetables in a farm when police officers went there and arrested him. He was thereafter taken to Moiben Police Station and then Eldoret Police Station. He was then charged with offences which he did not commit. He contended that he was framed by the complainants.

From all the foregoing facts availed to the trial Court by the prosecution and the appellant, we are satisfied that the ingredients of the offence of robbery with violence contrary to S. 296 (2) of the Penal Code were sufficiently established.

The occurrence of the concurrent acts of robbery remained an undisputed fact.

The bone of contention was the appellant's identification as having been part of the group of armed

robbers. The appellant vehemently denied the allegation and contended that he was incriminated by the complainants without good cause.

The offences occurred in the hours of darkness thereby creating difficult conditions for identification. This was compounded by the fact that the robbers were said to have been dressed in police uniform and wore hats or caps. The hats and/or caps would undoubtedly hinder proper identification of an individual. Indeed, most of the complainants did not identify any of the robbers.

The only evidence of direct identification of the appellant was that of PW 4 and PW 7. PW 4 (Elias Kiprop Kwambai) said that he was at his home when the robbers struck. His vehicle was commandeered by one of the robbers but it hit a store. He volunteered to drive the vehicle for them and when he went to get into the steering wheel he saw the appellant. He (PW 4) saw the appellant when he was leaving the steering wheel to make way for him (PW 4). In cross-examination by the appellant, PW 4 said that the vehicle's dashboard lights assisted him to see and identify the appellant. Earlier, he (PW 4) indicated that the appellant was a person previously known to him.

PW 7 (David Cheptarus) was also at his home when he was invaded by the robbers. He said that he identified the appellant as one of the robbers and was able to do so with the aid of faint moonlight. He (PW 7) also said that the appellant was not previously known to him and that he (PW 7) took about ten (10) minutes with him (appellant).

Our careful consideration of this evidence by PW 4 and PW 7 prevails upon us to hold that the alleged identification of the appellant was not free from the possibility of error or mistaken identification. We say so because, we do not think that the lights from a vehicle's dashboard or from the faint moon provided favourable conditions for proper and positive identification of any of the robbers. It is common knowledge that a vehicle's dashboard lights are normally low in intensity and faint moonlight can hardly enable a person to see and positively identify or even recognize another.

It is our opinion that the evidence of identification by PW 4 and PW 7 was not sound for a safe conviction of the appellant.

With regard to the doctrine of recent possession, we do not think that it was capable of applying in the present circumstances for the main reason that there was no evidence of recovery of the mobile phone and other items from the appellant.

The investigation officer (PW 10) was handed over the phone by members of the public after it was allegedly recovered from the appellant. The other recovered items were found elsewhere in a house which had to be broken open in the absence of the occupants.

The presumption under S. 119 of the Evidence Act cannot be invoked in the absence of proof of recovery of the stolen items hence proof of possession (See, **YUSUFU RASHID WANASORO ALIAS "TOTO" VS. REPUBLIC NBI. CRIMINAL APPEAL NO. 75 OF 2005 (C/A)**).

In the end result, we must hold that this appeal is merited. The appellant's conviction by the learned trial Magistrate on all the counts is hereby quashed and the sentence set aside. The appellant is set at liberty unless otherwise lawfully held.

F. AZANGALALA
JUDGE

J. R. KARANJA
JUDGE

[Delivered and signed this 30th day of June 2011]